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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1939**

## No. 201

BUCKSTAFF BATH HOUSE COMPANY,
PETITIONER,

*vs.*

ED I. McKINLEY, AS COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ARKANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

**PETITION FOR CERTIORARI FILED JULY 14, 1939.**

**CERTIORARI GRANTED OCTOBER 9, 1939.**

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INDEX.



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—4416

[fols. 1-2] [Captions omitted]

[fol. 3]

## IN CHANCERY COURT OF PULASKI COUNTY

No. 57,652

BUCKSTAFF BATH HOUSE COMPANY, Plaintiff,

v.

ED I. MCKINLEY, as Commissioner of the Department of Labor of the State of Arkansas, and

W. A. ROOKSBERRY, as Director of the Division of the Unemployment Compensation of the Department of Labor of the State of Arkansas, Defendants

COMPLAINT—Filed Aug. 19, 1938

Plaintiff for cause of action says that it is a corporation, organized under the laws of the State of Arkansas, with its only place of business situated on the United States Government Reservation in Garland County, Arkansas, known as Hot Springs National Park, and that the Defendants, Ed I. McKinley and W. A. Rooksberry, are the Commissioner and Director respectively of the Department of Labor of the State of Arkansas, charged with the duty of the enforcement of Act #155 of the General Assembly of Arkansas for 1937, commonly known as the Unemployment Compensation Bill.

Plaintiff says that during the period beginning on the first day of January, 1937, and ending on the thirty-first day of December, 1937, it had in its employ fifteen persons engaged in performing services in the operation of said bath house, for which Plaintiff became liable as an employer and paid the aggregate sum of $9,029.80. That during said period, fifteen attendants performed services at its bath house, who received in the aggregate the sum of $9,445.55, in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior hereinafter referred to; and that during said period, nine people performed services in the massage department, receiving in the aggregate the sum of $4,885.44, in accordance with said rules and regulations of the Department of the Interior.

[fol. 4] Plaintiff says that the Hot Springs National Park in Garland County, Arkansas, adjacent to the City of Hot Springs, is a United States Government Reservation, and that no jurisdictional supervision, regulation or control has been surrendered to the State of Arkansas, and that the property embraced in said Reservation has at all times heretofore been in the ownership of the United States, but that the consent of the United States was given to the State of Arkansas to tax under the laws of the State of Arkansas applicable to equal taxation of personal property in this State, as personal property, all structures and other property in private ownership on the Reservation.

Plaintiff says that at its expense it erected a bath house equipped and according to the specifications approved by the Secretary of the United States Department of the Interior within the boundaries of said Reservation, and that it operates the same under a lease entered into on the fifth day of August, 1931, with the United States of America, a copy which is hereto attached, marked "Exhibit A-1" and made a part hereof, which said lease corresponds to the general policy of the United States Department of the Interior covering the regulation and distribution of the waters of said Reservation, and its use, as evidenced by a copy of the lease of Superior Bath House and of Quapaw Bath House, hereto attached, marked "Exhibit A-2" and "Exhibit A-3" respectively and made a part hereof.

That its lease and all other leases of bath house priviliges on said Reservation are made in accordance with the Acts of Congress relating to said Reservation and the regulations promulgated by the United States Department of the Interior, a copy of said regulations being attached hereto, marked "Exhibit B" and made a part hereof.

Plaintiff says that its only business is that of furnishing baths in accordance with said lease and the regulations [fol. 5] of the United States Department of the Interior, all of which operations are conducted on and within the boundaries of said Reservation, and that it maintains no office or agency, nor does it perform any service of any character at any place beyond the boundaries of said Reservation.

Plaintiff says that it is an instrumentality of the United States in the use, distribution and conservation of the medicinal waters of said Reservation to the extent set out in the Acts of Congress relating to said Reservation, the leases

hereto attached, and the regulations of the United States Department of the Interior; and that as such, it is exempt from the contributions for employment specified in Act #155 of the General Assembly of Arkansas for 1937; and that the compensations for services performed by attendants and massagers does not constitute employment or wages within the meaning of said Act.

Plaintiff says that its operators and its properties on said Reservation are exempt from taxation, regulation or control by the Acts of Congress and the Acts of the General Assembly of the State of Arkansas relating to said Hot Springs National Park Reservation.

Plaintiff says that the attempted collection of said contribution violates Article 4, Section 3, Constitution of the United States.

That the employees, bath house attendants and massage operators above mentioned are residents of the State of Arkansas and that unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages and commissions.

Plaintiff says that the Defendants in their official capacities, under the said Act #155 of the General Assembly of the State of Arkansas for 1937, have assessed against it a tax contribution on the amounts paid to employees and earnings by attendants and massagers for the fiscal year of 1937 as above set out at the rate of 1.8% per annum, and are threatening to levy upon and sell Plaintiff's property for said assessment, contrary to law, and that said [fol. 6] levy and sale will irreparably damage Plaintiff, for which it has no complete and adequate remedy at law.

Wherefore, Plaintiff prays that the Defendants be restrained from levying and collecting said assessment contributions from it, and for all other proper relief.

E. R. Parham, Solicitor for Plaintiff.

[fol. 7] EXHIBIT "A-1" TO COMPLAINT

This Agreement made and entered into this 5th day of August, 1931, by and between John H. Edwards, Assistant Secretary of the Interior, acting for and in behalf of the United States of America, party of the first part, and hereinafter referred to as the Secretary, and the Buckstaff Bath House Company, a corporation organized and existing under the laws of the State of Arkansas, its successors and as-

signs, party of the second part, hereinafter referred to as the Operator.

Witnesseth: That pursuant to the provisions of a joint resolution of Congress, approved March 26, 1888 (25 Stat. 619), entitled "Joint Resolution to enable the Secretary of the Interior to utilize the Hot Water runnning to waste on the permanent reservation at Hot Springs, Arkansas, and for other purposes", and an Act of Congress approved March 3, 1891, (26 Stat. 842) entitled "An Act to regulate the granting of leases at Hot Springs, Arkansas and for other purposes", the parties hereto have mutually agreed and by these presents do mutually agree to and with each other as follows:

I. In Consideration of the rents, covenants and stipulations hereinafter mentioned, reserved and contained, the Secretary hereby grants leases unto the operator company the plot of ground in the Hot Springs National Park, Arkansas on which is located the Buckstaff Bath House, more particularly described as follows: Bath House Site No. 3 on plans submitted to the Department of the Interior on May 12, 1891, by the Superintendent of the Reservation, commencing at Station 2 and 10 feet on the building line, running thence Northerly along said building line a distance of 100 feet to Station 3 and 10 feet; then Easterly at right angles to building line 102.1 feet; thence Southerly 100.1 feet; thence Westerly at right angles to the building line 108 feet to the place of beginning.

II. To Have and to Hold for the term of twenty (20) years, commencing on the thirty first day of January, 1932, and ending on the thirty-first day of December, 1951; to-[fol. 8]-gether with the use of the hot waters from the Hot Springs National Park, for the purposes and only upon the terms and conditions herein mentioned; subject to the provisions of all existing laws of the United States and of such laws as may hereafter be enacted by Congress relating to, about or concerning the Hot Springs National Park, or the waters thereon, and the rules and regulations that have been, or may hereafter be, made and established by the Secretary of the Interior pursuant to any such acts of Congress, which are accepted and made a part hereof in the same manner and to the same effect as if such acts or rules and regulations, or their several provisions, were specifically set forth herein.

III. In Consideration Whereof, the Operator Company agrees to maintain and operate a bath house on said site with thirty (30) bath tubs and all necessary appliances for providing baths to the public and to pay the Secretary rental at the rate of eighty dollars ($80.00) per tub per annum for each and every bath tub allowed in said bath house, and whether erected or used or not, to be paid in advance in quarterly installments at the office of the superintendent of the park, subject to such changes as to rate as by law may be established and subject to the right of the Secretary, hereby reserved and acknowledged, to readjust and increase the amount of rent herein provided for to such sum per tub as he may deem just whenever during the continuance of this lease it may become necessary, and to meter the hot water and adjust the rate of rental on the basis of the actual amount of hot water furnished, whenever and if during the continuance of this lease such action may be deemed necessary for the conservation of the available supply of Hot Water; provided. That the Secretary may fix the rate of charges for baths in said bath house, including the services of attendants, which rate of charges shall be kept continuously and conspicuously posted in the bath house by the Company (operator); and the Company (operator) shall in no event charge in excess of such rates for baths therein, or enter into any combination with the lessees of other bath houses on or near the Hot Springs National Park to fix the prices [fol. 9] in violation of or different from the rates thus fixed. The number of tubs let may, in the discretion of the Secretary, be diminished or increased within the limit authorized by law, commencing from the first day of July in any year during the continuance of this lease, either upon his own motion or upon the written application of the Company (operator) to him to make such change, and rent shall then be paid for the number of tubs allowed; but there shall be no obligation on the part of the Secretary to supply hot water from the springs *from the springs* or reservoirs if at any time, in the judgment of the Secretary, said water shall not be sufficient; and for failure to furnish water in any case there shall be no claim or demand of any kind against the United States or the Secretary.

IV. And the Company (operator) agrees to keep and maintain the said bath house and premises continuously in complete repair and good order, with a sufficient number of

courteous and skilled attendants and servants, and further, in all particulars, as a first class bath house, and shall keep the furniture, furnishings, and appointments in first class condition and refit the same whenever in the judgment of the Secretary the circumstances require it. All decayed or wooden parts shall be replaced with iron, stone, or concrete, where practicable, so as to keep the building practically fire-proof, all work to be done to the satisfaction of the Secretary. In case the bath house now on the leased premises be destroyed by fire, or otherwise, during the term of this lease, the Company (operator) shall replace it with a building constructed of fire-proof material upon plans and specifications approved by the Secretary.

V. The Company (operator) shall, at its own expense, securely and adequately, with the best material, wall, curb, and cement the bottoms and sides and cover over all hot water springs now on said site, or which may be developed on the same by an excavations made thereon, and securely pipe the same to the exterior limits thereof, connect the same in such manner and at such point or points as the superintendent of the park may designate, for utilization at receiving reservoirs or pumping stations or otherwise; and [fol. 10] construct and maintain ways of access to all such springs at all times available to the superintendent or any agent of the Secretary; also keep the grounds and walks attached thereto or used in connection with said bath house in a clean condition and free from litter and rubbish, to the satisfaction of the superintendent. The Company (operator) shall also provide and maintain at its own expense, ample and safe sewerage and drainage, with all necessary appliances, conducted on the best principle to secure sanitary conditions, and particularly to protect from contamination all springs situated on said site, and keep the same in such condition, to the satisfaction of the superintendent.

VI. All blasting on said site and all excavations upon the same shall be made only upon permission and by direction of the superintendent; and nothing herein contained shall be construed as a grant unto the Company (operator) of any exclusive right either to the waters of any spring that may be upon the land hereby leased, or elsewhere, nor to bore for water upon said lands, nor any exclusive right to any thing whatever save the possession of the premises hereby leased, nor as a grant to appropriate or use the

premises or any part thereof otherwise or to any degree than as herein set forth, nor to devote said building in whole or in part to any other purpose than herein expressed, or willfully permit the waste or use of the hot water for other than bathing or drinking purposes. The superintendent of the park or other authorized agent or representative of the secretary shall at any time have access to said bath house and premises, and every part thereof, for purposes of inspection.

VII. The Company (operator), or its successors, or assigns, shall not during the life of this lease be interested, as lessee, assignee, owner, director, manager or otherwise, in any other bath house, bath house interest, or hot water privilege, at or near Hot Springs, or a stockholder in any corporation so interested; and it will not enter into any combination or pool with any other party so interested to share any profits or losses of bath house business, or share any [fol. 11] rates or charges or of accom-odations to be furnished or of other management of this or other bath house at or near Hot Springs, Arkansas.

VIII. The Company (operator) will not employ any agents or drummers to solicit patronage for said bath house, nor pay, nor cause to be paid, directly or indirectly, any drummer or agent for any such solicitation, nor permit the same to be done by any agent, servant, attendant, employee or rubber employed in or about said bath house, or permitted to work therein, any violation of this provision shall cause the immediate forfeiture of this lease; and the Company (operator) shall, when required by the Secretary, render to him during the life of this lease a monthly statement of the receipts and expenditures of said bath house, together with a statement of the number of baths daily administered therein, attested by the affidavit of the manager in charge.

IX. Neither this lease nor any interest therein shall be assigned, transferred or sublet by the Company (operator) to any person or persons, corporation or corporations, unless such assignment be first approved in writing by the Secretary, and any such attempted assignment or transfer without such approval shall not only be entirely void, but such act of attempted assignment unless approved, shall, of itself, cause the immediate forfeiture of this lease the

same, in all particulars and results, as if the terms hereof had expired absolutely by limitation; all rights of action however, being reserved to the United States for any breach of this contract by the Company (operator).

X. It is agreed that in case of default or payment of rent as herein stipulated, or if the Company (operator) shall fail to keep and observe any and all covenants hereof, or if it violates any of the regulations or any of the provisions of the statutes relating to the Hot Springs National Park, then and — either event, after the presentation of the facts and due recommendation by the Superintendent of the Hot Springs National Park to the Director of the National [fol. 12] Park Service the latter shall, with the approval of the Secretary, withhold the use of the hot water for a period of thirty days, during which period the Company (operator) shall have the opportunity to appeal to the Secretary for a further review of the matter and if at the expiration of the period of thirty days and the conclusion of the further review, the Secretary still approves of the recommendations of the Superintendent of the Park, then this lease and all rights or privileges herein shall be forfeited at the option of the Secretary, and the terms hereof ended, and the said premises may be taken possession of on behalf of the United States in the same manner as if the full term of the lease had expired, except as hereinafter provided, but there shall be ten days notice to the Company (operator) hereof by service upon its representatives or placed conspicuously on the premises.

XI. It is further agreed that if, on the expiration of this lease by limitation of time, the premises shall be leased to some one other than the Company (operator), the latter shall be given the opportunity to be reimbursed for the reasonable value of its buildings, fixtures, stock, equipment and other property thereon as the Secretary may, by an inspection made within six months prior to such termination, determine to be appropriate for use on said premises and in enhancement of the value thereof for the purpose of conducting a bath house. The value of such property shall then be ascertained by a board of three appraisers appointed as follows: at least ninety days before the expiration of this lease, the Secretary and the Company (operator) shall choose one appraiser, and the two selected

shall then choose a third. If they do not within thirty days of their designation agree upon a third appraiser, then the Secretary shall select such third appraiser. The salary and expenses of the third appraiser shall be paid by the Company (operator). This board, or a majority thereof, shall within thirty days from the designation of the third member, and after an inspection of the property to be appraiser and the taking of such testimony as may be adduced by the [fol. 13] parties in interest, report their findings to the Secretary, who may approve, set aside, or modify the same, or order a new appraisal as he may see fit.

The value of such buildings and property when determined by the Secretary, whose decision in the premises shall be final, shall be paid at the time and in the manner directed by him, to the Company (operator) hereunder by the person, company, corporation or association to whom the premises are to be leased; Provided, that nothing shall be construed as creating a claim against the United States, or shall prevent the Secretary from leasing or subletting said property and the improvements thereon in such manner and upon such terms as may be necessary for the full protection of the interests of the Government, or shall delay the surrender of the premises with all the buildings, fixtures and appurtenances thereon upon any termination of this contract, or shall in any manner charge the Government for the use of such buildings or other property.

XII. It is hereby distinctly understood that no exclusive privileges are, or are intended to be, created by this lease, but the same are hereby prohibited; and the terms hereof shall be so construed as to carry this understanding and agreement in this particular into complete effect.

XIII. No member of or delegate to Congress, or resident Commissioner, or officer or employee of the Department of the Interior, is or shall be admitted to any share or part in this agreement, or derive any benefit which may arise therefrom, and the provisions of Section 3741 of the revised Statutes of the United States, and Sections 114, 115 and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat. 1100), relating to contracts, enter into and form a part of this agreement, so far as they may be applicable.

In Witness Whereof the parties hereto have caused these presents to be executed and their seals affixed the day and the year above written.

[fol. 14] John H. Edwards, Assistant Secretary of the Interior. McD. Buckstaff Bath House Company, by A. H. Buckstaff, President. Attest: G. E. Hogaboom, Secretary.

[fol. 15] [File endorsement omitted.]

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[fol. 16] In Chancery Court of Pulaski County

[Title omitted]

Demurrer—Filed Nov. 1, 1938

Come the Defendants and demur to the Complaint and for grounds, state:

Said Complaint does not contain allegations sufficient to constitute a cause of action against the Defendants.

Said Complaint shows on its face that the Plaintiff is not entitled to the relief prayed for, or any relief whatsoever.

Walter L. Pope, Solicitor for Defendants.

[File endorsement omitted.]

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[fol. 17] In Chancery Court of Pulaski County

[Title omitted]

Order Sustaining Demurrer

On this day comes on to be heard the above entitled cause and the same being submitted to the Court for its consideration and judgment on the Complaint of the Plaintiff, together with its exhibits, the Demurrer of the Defendants and the argument of Counsel, and the Court, being well and sufficiently advised as to all matters of law and fact and the premises being fully seen, doth order, adjudge and decree that said Demurrer be sustained, and the Plaintiff, electing to stand on its Complaint, the same is dis-

missed, to which action the Plaintiff objects and prays an appeal to the Supreme Court, which is hereby granted.

November 9, 1938.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 19] IN SUPREME COURT OF ARKANSAS

5435

Appeal from Pulaski Chancery Court

BUCKSTAFF BATH HOUSE COMPANY, Appellant,

v.

ED I. MCKINLEY, Commissioner of Labor, et al., Appellees

JUDGMENT—April 10, 1939

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant all their costs in this court in this cause expended, and have execution thereof.

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[fol. 20] IN SUPREME COURT OF ARKANSAS

No. 5435

BUCKSTAFF BATH HOUSE COMPANY, Appellant,

v.

ED I. MCKINLEY, Commissioner, et al., Appellees

OPINION—April 10, 1939

GRIFFIN SMITH, C. J.

Appellant denies it is subject to the provisions of Act No. 155, approved February 26, 1937,[1] and refused to pay

[1] Pope's Digest, secs. 8549 to 8569.

the tax alleged by appellees to be due for the 1937 calendar year.

Injunctive relief was sought to prevent E. I. McKinley, as Commissioner of the Department of Labor, and W. A. Rooksberry, as Director of the Division of Unemployment Compensation of the [Arkansas] Department of Labor, from levying and collecting assessments provided for by the Act. Appellant insists that, although it is an Arkansas corporation, its place of business is within the United States Government Reservation at Hot Springs, in Garland County. It admits that during the period in question it had in its employ fifteen persons engaged in performing services in the operation of its bathhouse "* * * for which plaintiff became liable as an employer and paid the aggregate sum of $9,029.80." During the same period fifteen attendants "* * * performed services at [plaintiff's] bathhouse, who received the aggregate sum of $9,445.55 in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior, * * * and that during said period nine people performed services in the massage department, receiving in [fol. 21] the aggregate the sum of $4,885.44, in accordance with rules and regulations of the Department of the Interior."

Appellant's first position is that because of its situation within the boundaries of a government reservation, jurisdictional supervision, regulation, control, etc., have not been surrendered to the State of Arkansas to an extent permitting assessment of the unemployment tax, notwithstanding that consent of the United States was given the State to tax, as personal propery, all structures and other personal property in private ownership within the Reservation.

Appellant, at its own expense, erected a bathhouse and equipped it according to specifications approved by the Secretary of the Interior. It operates the business under a lease executed in 1931.

Secondly, appellant says that it is an instrumentality of the United States Government, engaged in the distribution and conservation of medicinal waters of the Reservation to the extent authorized by acts of Congress relating thereto and rules of the Department of the Interior, and that as such instrumentality it is exempt from the contributions specified in Act 155 of the Arkansas General Assembly; that "* * * compensation for services performed by attendants and

massagers does not constitute employment or wages within the meaning of said Act."

It is further urged that collection of the tax or contribution would be violative of Art. 4, sec. 3, of the Constitution of the United States.

Department of the Interior regulations for bathhouses, made a part of contracts under which waters of the Reservation are allocated, show a retention by the Department of certain elements of control.[2]

We must first determine whether collection of the tax laid by Act 155 is a legitimate exercise of the State's governmental functions.

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[2] Regulations of the Department of the Interior provide that bathhouses shall be allowed such number of tubs as the Secretary of the Interior may deem necessary for the public service. Charges shall be fixed by the Secretary. Tickets shall be sold at specified rates and only to persons intending to use them for bathing. Tickets are redeemable according to a scale fixed by the Department of the Interior. No complimentary tickets may be issued, nor any sale of bath equipment on the premises. No person shall be allowed to bathe without a ticket registered in the office of the Superintendent [of the Reservation]. The rate of charges for massages and tickets are fixed at varying amounts, providing for that portion of the ticket [or interest therein] which shall belong to the attendant or masseur. All attendants, masseurs, etc., are required to undergo physical examination. Drumming and soliciting are prohibited. Regulations as to the use and sale of bath mitts, towels, sheets, blankets, etc., are included. Approval of the Superintendent required for the employment of any person in the bathhouses of Hot Springs National Park. Bath attendants prohibited from performing their work on the premises without having passed a written examination, a physical examination, and without paying their privilege fee to the Department. They may charge for their services not exceeding 20 cents for a single bath, and $4 for a course of baths. Superintendent authorized to collect a fee of $6 for examination of bath attendants. Masseurs similarly regulated. Bathhouse required to furnish the Superintendent with daily and monthly reports of activities. No stock in an incorporated bathhouse may be transferred without consent of the Director of the National Park Service.

Having found that "Economic insecurity due to unem-
[fol. 22] ployment is a serious menace to the health, morals, and welfare of the people of the State," and that "Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action," it was the General Assembly's considered judgment that "* * * the public good, and the general welfare of the citizens of this State require the enactment of [the Unemployment Compensation Law] under the police power of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

An excise tax is levied on wages paid to employees, to be paid by the employer at the rate of 1.8% for 1937, and 2.7% after December 31, 1937. Future rates are to be based on benefit experience.

The National Social Security Act,[a] Title IX, levies a tax on every employer (with stated exceptions) of eight or more. Payments covering the 1936 calendar year were 1%, due January 1, 1937. For 1937 the rate was 2%; and 3% thereafter. The term "employment" excludes agricultural labor, domestic services in private homes, and other small classes.

Allowable credits are provided by Sec. 1102. Against the tax so imposed, the amount of contributions (with respect to employment during the taxable year paid by such taxpayer into any unemployment fund under a state law having the approval of the National Social Security Board) not to exceed 90%, may be deducted by the taxpayer.

Effect of these provisions is this: The Arkansas rate for 1937, being 1.8%, and the Federal rate being 2%, the taxpayer in reporting to the Federal Government took credit for the payment made to the State, and remitted two tenths of one per cent to Washington. For 1938 credit was taken for 2.7%, and three tenths of one per cent was sent to the Federal treasury.

All remittances on pay rolls involving less than eight persons, made directly to the Unemployment Compensation
[fol. 23] Division of the Arkansas Department of Labor, go into the treasury at Washington and earn 3% interest. Remittances on pay rolls of eight or more covering the tax assessed by Act 155, although made to the State Unemploy-

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[a] Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7 (Supp).

ment Division, are likewise sent to the National Treasury and become a trust fund for the benefit of employees within the classification of eight or more. If there be no state unemployment compensation law of a character meeting approval of the National Social Security Board, the full amount levied under Title IX is collected by the Federal Bureau of Internal Revenue and is deposited generally in the U. S. Treasury without credit to the state wherein the collection is made.

Appellant admits it was liable to the United States for unemployment compensation tax levied under Title IX of the Social Security Act,[4] and that such tax has been paid.

The three questions for determination are:

(1) Did the Federal Government authorize the State to assess and collect taxes of the character herein discussed?

(2) Is appellant a governmental instrumentality or agency, and therefore excused?

(3) Are appellant's employees independent contractors?

By Act of March 3, 1891,[5] the Congress of the United States extended the Federal Government's consent "• • • for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property [of] all structures and other property in private ownership on the Hot Springs Reservation."

Ex Parte Gaines,[6] decided more than a year after Congress had extended the authority just referred to, declared the law to be: "When the Government parts with its title, or any interest therein, the property or interest which the Government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, [fol. 24] whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property • • • The interest of the lessee in the land is not the property of the United States, and it is

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[4] U. S. Code Annotated, Title 42—The Public Health and Welfare.

[5] —U. S. C. Annotated, p. 365.

[6] 56 Ark. 227, 19 S. W. 606. Opinion dated May 21, 1892.

not a means employed by the Government to obtain a government end. The power to tax that interest does not involve, therefore, the power to destroy or disturb any interest of the United States Government."[7]

The tax laid by Act 155 is not a tax on personal property; nor is it, in any sense, a property tax. But the Congress seemingly intended (and this construction is strengthened by the Gaines Case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the Federal laws and under rules promulgated by the Interior Department.

Lands were leased, and individuals, corporations, partnerships, etc., were permitted to erect buildings and to engage in activities for profit and amusement. Healing properties of the medicinal waters were recognized, and the use of such waters was circumscribed in order that opportunity might be afforded the public to enjoy the benefits.

But the Government, per se, did not engage in the business of operating appellant's bathhouse. On the contrary, it leased the site and fixed the fees to be charged by operators. The extent to which such regulations were carried is shown in the second footnote to this opinion.

Constitutionality of the National Social Security Act was assailed in Stewart Machine Company v. Davis.[8] The controversy reached the Supreme Court of the United States, where in an opinion written by Mr. Justice Cardozo[9] it was

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[7] The Little Rock & Fort Smith Ry. v. R. W. Worthen, Collector, Etc., et al., 46 Ark. 312. See third headnote. This case is cited in Ex parte Gaines.

[8] 301 U. S. 548. Petitioner was an Alabama corporation. It paid its tax of $46.14 and filed a refund claim with the Commissioner of Internal Revenue, and sued to recover, asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant, dismissing the complaint. The Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F. 2d 207. Certiorari was granted.

[9] Mr. Justice Cardozo, in the Steward Machine Company-Davis case, stated that the decision of the Court of Appeals was in accord with judgments of the Supreme Judicial Court of Massachusetts, the Supreme Court of California, and the

said: "'The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment.''

Carmichael v. Southern Coal Company [10] is another case [fol. 25] in point. The opinion, written by Mr. Justice Stone, contains the following statements:

"This court has long and consistently recognized that the public purpose of a state, for which it may raise funds for taxation, embrace expenditures for its general welfare * * *. The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods * * *. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals."

Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted from have been cited.

The Legislature had the right to require that employers make contributions in the manner provided by Act 155. The National Social Security Act denominates the contribution "an excise tax levied on employers." That the required payment is referred to in our Act 155 as a "contribution" is of no significance. It is a compulsory contribution, and therefore a tax.

In its original sense an excise was something cut off from the price paid on a sale of goods, as a contribution to the

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Supreme Court of Alabama. It was in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented. (See page 573, 301 U. S.).

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[10] 301 U. S. 495, 57 S. Ct. 568. (The Arkansas Unemployment Compensation Law is said to be almost identical with the Alabama Law).

support of the government. In its broader meaning it now seems to include every form of taxation which is not a burden laid directly upon persons or property—every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.[11]

[fol. 26] In State v. Handlin [12] it was said [with respect to the inheritance Act of May 17, 1907]: "We • • • hold that the tax provided by this Act upon the privilege of succeeding to inheritances and estates was well within the power of the Legislature to impose, being included within its express powers to 'tax privileges in such manner as may be deemed proper.' "

Quoting from Judge Cooley,[13] Chief Justice McCulloch said: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes."

Individuals, firms, and corporations engaged in business are privileged to do so because of the protection extended by government. Enforcement of contracts generally is a matter of constant judicial address. The State's welfare is best served when those of its citizens who must labor are able to find employment at profitable wages and in healthful surroundings. The contribution exacted by Act 155 becomes cumulative for use when the worker finds himself industrially adrift. His misfortune is not one affecting the individual alone. It extends to the entire community. If unemployment cannot be avoided, at least its tragic conse-

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[11] Ballentine's Law Dictionary, pp. 460-461. "An interesting review of the authorities discussing the meaning of the word 'excise' will be found in Mr. Justice Brewer's opinion in Patton v. Brady, 184 U. S. 608, 46 L. Ed. (U. S.) 713, 22 S. Ct. 493."

[12] 100 Ark. 175, 139 S. W. 1112.

[13] Ex Parte Byles, 93 Ark. 612, 126 S. W. 94; 37 L. R. A., NS 774, error dismissed, 1912, 32 S. Ct. 836, 225 U. S. 717, 56 L. Ed. 1270.

quences can be ameliorated. Such is the purpose of the statute in question.

In the instant case, if it be urged that the tax is laid against the privilege of paying employees, or upon the right of an employer to engage labor (and therefore unrelated to personal property as appellant insists and beyond the grant of authority expressed in the Act of 1891, and not to be reasonably implied from the nature of the grant), the answer is that the Federal Government has enacted a similar tax; and appellant, having more than eight employees, comes within the classification from which unemployment [fols. 27-30] compensation is exacted. We are asked to say that the Congress has not conferred upon Arkansas the right to impose the excise in question, while at the same time the National Social Security Act imposes a similar tax on employers in each of the forty-eight states. Conceding, as we must, that authority of the State to collect the tax does not come from the Social Security Act of Congress, yet the power conferred by Act of 1891 to tax personal property impliedly carried with it the right to tax the use of such property to the same extent and in manner similar to property not within the Reservation.

It is next insisted by appellant that it possesses all of the characteristics necessary to classification as a governmental agency or instrumentality, and, as such, is exempt from the tax.

The rule announced in Cooley on Taxation [14] is that "A corporation cannot escape state taxation merely because it

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[14] Fourth Edition, v. 2, p. 1300. See Metcalf & Eddy v. Mitchell, 269 U. S. 514; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Fidelity & Deposit Company v. Pennsylvania, 240 U. S. 319; James v. Dravo Constructing Company, 302 U. S. 34; Union Pacific Railroad Company v. Peniston, 18 Wa. 5, 21 L. Ed. 787; Trinityfarm Construction Company v. Grosjean, 291 U. S. 466, 54 S. Ct. 469-70, 78 L. Ed. 918.

Mr. Justice Stone of the Supreme Court of the United States has excellently reviewed the subject of immunity of Federal agencies and instrumentalities from state taxation. See Mark Graves, et als., Commissioners, v. People of the State of New York, etc., Law Edition Advance Opinions, v. 83, p. 577. The opinion sustains the views we have expresed in the instant case.

was created by the Federal Government, nor because it was subsidized by it, nor because it was employed by the Federal Government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States."

Imposition of the tax here does not in any sense interfere with the Government's business. On the contrary, the expressed social policies of the Government are sustained and promoted.

Finally, appellant urges that its employees are independent contractors. In its complaint it alleged they were employees. There was a declaration that "The employees, bath attendants and massage operators * * * are residents of the State of Arkansas, and * * * unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages, and commissions." If it now be urged that language of the complaint was inadvertent, still we think the record establishes the relationship of master and servant, and the point must be overruled. The means and methods by which the work was done were subject to directions of appellants.

Action of the chancellor in sustaining the demurrer to appellant's complaint was correct, and the decree dismissing the complaint is affirmed.

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[fol. 31] IN SUPREME COURT OF ARKANSAS,

[Title omitted]

PETITION FOR REHEARING—Filed April 12, 1939

Appellant prays that it be granted a rehearing in this cause and for reason says:

That the court has failed to take into consideration that the General Assembly of the State of Arkansas ceded jurisdiction to the Federal Government of the lands involved in the year 1903, subsequent to the decision of this court in the case of ex parte Gaines in the year of 1892, in determining the extent of the grant of the Federal Government to the State of Arkansas of the right to tax operations within the given area, and in failing to give effect to the restriction contained in the act of congress of

March 3, 1891 restricting the grant to the right to tax personal property only.

That the court failed to take into consideration that the fees of attendants on which a contribution was exacted were beyond the power of appellant to regulate and such enforced contributions would constitute the taking of private property without due process of law in violation of Amendment No. V of the Constitution of the United States.

Respectfully Submitted, (Signed) E. R. Parham, Solicitor for Appellant.

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[fol. 32] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 23, 1939

* * * * * * *

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

* * * * * * *

5435

BUCKSTAFF BATH HOUSE COMPANY,

v.

ED I. MCKINLEY, Commissioner of Labor, et al.

* * * * * * *

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[fol. 33] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OMITTING PORTIONS OF RECORD

It is stipulated and agreed by and between E. R. Parham and Terrell Marshall, counsel for appellant, and W. L. Pope, counsel for appellees, that the following exhibits shall be omitted from the record prepared by the Clerk of the Supreme Court of Arkansas on appeal to the Supreme Court of the United States, the same being cumulative and

not essential to show the errors complained of, set forth in appellant's Assignment of Errors:

(1) The lease of Superior Bath House, attached to plaintiff's Complaint, marked "Exhibit A-2", pages 17 to 25 of the Record.

(2) The lease of Quapaw Bath House, attached to plaintiff's Complaint, marked "Exhibit A-3", pages 26 to 36 of the Record.

(3) The regulations of the Department of the Interior for the Hot Springs National Park, attached to plaintiff's Complaint, marked "Exhibit B", page 37 of the Record.

(4) Copy of Opinion annexed to Statement of Jurisdiction, pages — to — of the Record.

Dated June 22, 1939.

Terrell Marshall, E. R. Parham, Counsel for Appellant. W. L. Pope, Counsel for Appellees.

[fols. 34-35] Clerk's Certificates to foregoing transcript omited in printing.

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[fol. 36] IN SUPEME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed June 24, 1939

To the Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, Buckstaff Bath House Company, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

This cause originated in the Pulaski Chancery Court, in which Court, by the complaint of the plaintiff, there was drawn in question the validity of Act No. 155 of the General Assembly of Arkansas for the year 1937, on the ground of its being repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, and that the decision in said Court was in favor of its validity.

The Supreme Court of the State of Arkansas is the highest Court in this State in which a decision in this suit can be had.

In said Court there was drawn in question the validity of said Act No. 155 of the General Assembly of Arkansas for 1937, on the ground that said statute was repugnant to the [fol. 37] laws of the United States in that appellant's operations were confined solely to the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded jurisdiction to the United States and that said Act was repugnant to Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844) and Act of Congress, April 20, 1904 (33 Stat. 187) and that the decision of said Court was in favor of its validity.

Therefore, in accordance with paragraph 237 (a) of the Judicial Code, and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force, when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of Arkansas, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of said Supreme Court of the State of Arkansas may be examined and reversed, and also prays that a transcript of the record proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that the bond for costs tendered by the petitioner be approved.

Terrell Marshall, E. R. Parham, Attorneys for Petitioner.

Dated: June 22, 1939.

[File endorsement omitted.]

[fol. 38] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 24, 1939

The petition of Buckstaff Bath House Company, the appellant in the above entitled cause, for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Arkansas, having been filed with the Clerk of the Supreme Court of Arkansas and presented therein, accompanied by Assignment of Errors and Statement of Jurisdiction, as provided by Rule 12 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby,

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 10th day of April, 1939, on which a petition for rehearing was entertained and overruled on the 23rd day of May, 1939, in the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas shall within forty days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of [fol. 39] said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties, or their counsel herein, in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that said appellant shall give a good and sufficient bond for costs in the sum of $1000; that it shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas.

Dated: June 22, 1939.

[File endorsement omitted.]

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[fol. 40] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 24, 1939

Now comes the above plaintiff and files herewith its petition for an allowance of appeal, and says that there are errors

in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 155 of the General Assembly of Arkansas for the year 1937 was applicable to the operations of plaintiff, which were confined solely to the Hot Springs National Park Reservation in Garland County, Arkansas. The validity of said Act, so far as it affected plaintiff's operations, was denied and drawn in question by the plaintiff on the ground of its being repugnant to Act of Congress, April 20, 1904, and of plaintiff's being exempt from the operation of said Act by reason of the cession by the State of Arkansas to the United States, by Act No. 30 of the General Assembly of Arkansas for 1903, of exclusive jurisdic-[fol. 41] tion over the Hot Springs National Park Reservation, reserving only the right to tax, as personal property, all structures and other property in private ownership in the Hot Springs National Park, which area was accepted by the United States under said Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383).

The said errors are more particularly set forth as follows: The Supreme Court of Arkansas erred in holding and deciding:

I

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax the use of personal property within the Hot Springs National Park Reservation.

II

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844), and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383), by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership in the Hot Springs National Park Reservation, impliedly extended the right to tax the use of such personal property.

III

That the State of Arkansas was not prohibited by Act of Congress of March 3, 1891, and Act of Congress of April

20, 1904, from levying and collecting a tax on the privilege of employment on the Hot Springs National Park Reservation.

IV

That by the agreement entered into between the United States of America and the State of Arkansas respecting [fol. 42] jurisdiction of the area embraced in the Hot Springs National Park as reflected by Acts of Congress of April 20, 1832 (c. 70, 4 Stat. at L. 505), December 16, 1878 (c. 5, 20 Stat. 258), March 3, 1891, and April 20, 1904, and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

For which errors the plaintiff, Buckstaff Bath House Company, prays that the said judgment of the Supreme Court of Arkansas dated the 10th day of April, 1939, be reversed and a judgment rendered in favor of the plaintiff, and for costs.

Terrell Marshall, E. R. Parham, Attorneys for Buckstaff Bath House Company.

[File endorsement omitted.]

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[fols. 43-44] Bond on appeal for $1,000, approved June 22, 1939, and filed June 24, 1939, omitted in printing.

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[fol. 45] Citation, in usual form, showing service on W. L. Pope, filed June 24, 1939, omitted in printing.

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[fol. 46] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 24, 1939

To Mr. C. R. Stevenson, Clerk of the Supreme Court of the State of Arkansas:

You will please prepare the record upon appeal of the above named appellant to the Supreme Court of the United

States, from the final judgment and decision of the Supreme Court of Arkansas, entered in said cause in favor of Ed I. McKinley, etc., and W. A. Rooksberry, etc., appellees, and include in such record the following:

(1) The original Petition for Appeal to the Supreme Court of the United States, with the Assignment of Errors and Prayer for Reversal attached thereto.

(2) The Statement of Jurisdiction and appellees' reply thereto.

(3) The original Allowance of Appeal.

(4) A copy of the Bond and its approval.

(5) The original Citation with proof of service thereon.

(6) A copy of the opinion of the Supreme Court of the State of Arkansas in such cause.

(7) A copy of the minutes of said Court with reference to said cause.

(8) A copy of the Petition for Rehearing of the above named appellant.

[fol. 47] (9) A copy of the record on appeal to said State Supreme Court from the Pulaski Chancery Court, including the exhibits thereto annexed and admitted in said cause.

(10) Statement showing the filing of such Bond and the lodgment of copies of the Allowance of Appeal in your office.

(11) A return to such Allowance of Appeal and a statement of costs.

(12) Proof of service of Praecipe, Assignment of Errors, and Statement of Jurisdiction.

(13) Stipulation on omission of exhibits.

(14) A copy of this Praecipe.

Please certify the same to the said Supreme Court of the United States under your seal, in accordance with the rules of said Court and the laws of the United States upon such appeals.

Terrell Marshall, E. R. Parham, Attorneys for Appellant. Residence and Post Office Address, Little Rock, Arkansas.

Dated this the 22 day of June, 1939.

[File endorsement omitted.]

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[fol. 48] Certificate of lodgment omitted in printing.

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANT'S POINTS ON WHICH IT INTENDS TO RELY, AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION—Filed July 14, 1939

Appellant adopts its Assignment of Errors as a statement of the points upon which it intends to rely, and states that the entire record, as filed, is necessary for a proper consideration of the case.

Terrell Marshall, —— ——, Attorneys for Appellant.

I acknowledge service for the appellees of the foregoing statement of the appellant of the points on which it intends to rely, and of that part of the record which it considers necessary for the proper consideration of the case.

This the 11th day of July, 1939.

W. L. Pope, Attorney for Appellees.

[fol. 49½] [File endorsement omitted.]

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[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 9, 1939

Appeal from the Supreme Court of the State of Arkansas

Treating the appeal papers herein from the Supreme Court of the State of Arkansas as a petition for writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said petition for writ of certiorari be, and the same is hereby, granted.

Mr. Justice Butler took no part in the consideration and decision of this case.

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[Endorsed on cover:] File No. 43,608. Arkansas Supreme Court. Term No. 201. Buckstaff Bath House Company, Appellant, vs. Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas, et al. Filed July 14, 1939. Term No. 201, O. T., 1939.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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## No. 201

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BUCKSTAFF BATH HOUSE COMPANY,
*Appellant,*

*vs.*

ED I. McKINLEY, AS COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ARKANSAS, ET AL.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

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## STATEMENT AS TO JURISDICTION.

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TERRELL MARSHALL;
E. R. PARHAM,
*Counsel for Appellant.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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# No. 201

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BUCKSTAFF BATH HOUSE COMPANY,
*Appellant*,

*vs.*

ED I. McKINLEY, AS COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ARKANSAS, AND W. A. ROOKSBERRY, AS DIRECTOR OF THE DIVISION OF UNEMPLOYMENT COMPENSATION OF THE DEPARTMENT OF LABOR OF THE STATE OF ARKANSAS, *Appellees*.

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## STATEMENT AS TO JURISDICTION ON APPEAL.

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Appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully states:

(A) This is an appeal from a judgment from the Supreme Court of Arkansas taken under the provisions of United States Code, Title 28, Section 344 (Judicial Code, Sec. 237), par. (a) and amendments, and involves the validity of a statute of the State of Arkansas taxing operations of appellant conducted solely on the Hot Springs National Park Reservation in Garland County, Arkansas, in violation of a statute of the United States and repugnant to the laws of the United States.

(B) Act No. 155 of the General Assembly of the State of Arkansas, approved February 26, 1937, levied on all employers in the State of Arkansas a contribution of 1.8% of wages paid employees during the calendar year of 1937, to create a fund for unemployment compensation. Appellant paid its unemployment contribution for said period to the Collector of Internal Revenue of the United States under Act of Congress, August 14, 1935, c. 531, Title IX, par. 901, 49 Stat. 639.

The Acts of Congress and the Act of the General Assembly of Arkansas fixing jurisdiction of appellant's operations are set forth as follows:

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

> "The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any other purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

> "Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

> "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"SECTION 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * * Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * * And provided,

further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

Constitution of Arkansas (1874), Art. XVI, par. 5:

"All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

(C) This case was decided by the Supreme Court of Arkansas on the 10th day of April, 1939, (R. p. 41) and petition for rehearing was entertained and overruled on the 23rd day of May, 1939, (R. p. 54) the Supreme Court judgment then becoming final, and this application for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on the 22nd day of June, 1939.

(D) Appellant, Buckstaff Bath House Company, filed its complaint in the Pulaski Chancery Court against Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas, and W. A. Rooksberry, as Director of the Division of Unemployment Compensation of the Department of Labor of the State of Arkansas, asking for an injunction restraining the defendants from collecting unemployment contributions from it for the calendar year

1937 under Act No. 155 of the General Assembly of Arkansas, approved February 26, 1937, on the ground that appellant's sole operation and only place of business was conducted and located on the Hot Springs National Park Reservation in Garland County, Arkansas, over which area the State of Arkansas had ceded exclusive jurisdiction to the United States of America, reserving only the right to tax, as personal property, all structures and other property in private ownership within the area, and that the attempted collection under Act No. 155 of the General Assembly of Arkansas for 1937, so far as employment within this area was concerned, violated the statutes of the United States and were repugnant to the laws of the United States applicable to the particular part of the Hot Springs National Park Reservation on which plaintiff had its place of business and conducted its operations.

The defendants filed a general demurrer to the complaint, which was sustained, and the Chancery Court, on the 9th day of November, 1938, dismissed the cause.

The question involved was substantial in that jurisdiction of the area between the State of Arkansas and the United States, as reflected by the reciprocal Acts of Congress and of the Legislature of the State of Arkansas, was drawn in issue and a decision on which was necessary to determine the cause, which said decision was against and repugnant to the Acts of Congress of the United States.

Plaintiff duly appealed to the Supreme Court of Arkansas, which is the highest State court, and it sustained the action of the lower court in dismissing plaintiff's complaint, holding that said Act No. 155 was not "in any sense a property tax", but that it did not offend the Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844, in that the power conferred by that Act impliedly carried with it the right to tax the use of such property.

Petition for rehearing was denied on the 23rd day of May, 1939. In its brief to the Supreme Court of Arkansas, appellant set up its claim that the Act, and the collection thereunder, was repugnant to Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3; Act of Congress, December 16, 1878, c. 5, 20 Stat. 258; Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844; and Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187, and this claim was repeated on the petition for rehearing.

To sustain the jurisdiction of this Court and to reverse this cause, appellant relies on the following cases:

*Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 517;

*Yellowstone Nat. Park Transportation Co.* v. *Gallatin County*, 31 F. (2d) 644;

*Ft. Leavenworth Railway Company* v. *Lowe*, 114 U. S. 525;

*Wachovia Bank & Tr. Co.* v. *Daughton*, 272 U. S. 567;

*James* v. *Dravo Contracting Co.*, 302 U. S. 134;

*Arlington Hotel Co.* v. *Fant*, 278 U. S. 439;

*Williams* v. *Arlington Hotel Co.*, 22 F. (2d) 669;

Hot Springs Cases (Historical)—*Henry M. Rector* v. *U. S.*, 92 U. S. 698;

*Hammond* v. *Whittridge, Trustee*, 204 U. S. 538.

It is therefore respectfully submittted that the Supreme Court of the United States has jurisdiction to hear and determine this appeal.

TERRELL MARSHALL,
E. R. PARHAM,
*Attorneys for Appellant.*

## EXHIBIT "A".

BUCKSTAFF BATH HOUSE COMPANY

v.

MCKINLEY, Commissioner.

No. 4-5435.

**Opinion Delivered April 10, 1939.**

Appeal from Pulaski Chancery Court; Frank H. Dodge, Chancellor; affirmed.

GRIFFIN SMITH, *C. J.*

Appellant denies it is subject to the provisions of Act No. 155, approved February 26, 1937, and refused to pay the tax alleged by appellees to be due for the 1937 calendar year.

Injunctive relief was sought to prevent E. I. McKinley, as Commissioner of the Department of Labor, and W. A. Rooksberry, as Director of the Division of Unemployment Compensation of the (Arkansas) Department of Labor, from levying and collecting assessments provided for by the act. Appellant insists that, although it is an Arkansas corporation, its place of business is within the United States Government Reservation at Hot Springs, in Garland County. It admits that during the period in question it had in its employ fifteen persons engaged in performing services in the operation of its bathhouse "* * * for which plaintiff became liable as an employer and paid the aggregate sum of $9,029.80." During the same period fifteen attendants "* * * performed services at (plaintiff's) bathhouse, who received the aggregate sum of $9,445.55 in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior, * * * and that during said period nine people performed services in the massage department, receiving in the aggregate the sum of $4,885.44, in accordance with rules and regulations of the Department of the Interior."

Appellant's first position is that because of its situation within the boundaries of a government reservation, juris-

dictional supervision, regulation, control, etc., have not been surrendered to the State of Arkansas to an extent permitting assessment of the unemployment tax, notwithstanding that consent of the United States was given the State to tax, as personal property, all structures and other personal property in private ownership within the Reservation.

Appellant, at its own expense, erected a bathhouse and equipped it according to specifications approved by the Secretary of the Interior. It operates the business under a lease executed in 1931.

Secondly, appellant says that it is an instrumentality of the United States Government, engaged in the distribution and conservation of medicinal waters of the Reservation to the extent authorized by acts of Congress relating thereto and rules of the Department of the Interior, and that as such instrumentality it is exempt from the contributions specified in act 155 of the Arkansas General Assembly; that "• • • compensation for services performed by attendants and massagers does not constitute employment or wages within the meaning of said Act."

It is further urged that collection of the tax or contribution would be violative of Art. 4, Sec. 3, of the Constitution of the United States.

Department of the Interior regulations for bathhouses, made a part of contracts under which waters of the Reservation are allocated, show a retention by the Department of certain elements of control.

We must first determine whether collection of the tax laid by Act 155 is a legitimate exercise of the State's governmental functions.

Having found that "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the State", and that "Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action", it was the General Assembly's considered judgment that "• • • the public good, and the general welfare of the citizens of this State require the enactment of (the Unemployment Compensation Law) under the police power of the State, for the compulsory setting aside of unemployment reserves to

be used for the benefit of persons unemployed through no fault of their own".

An excise tax is levied on wages paid to employees, to be paid by the employer at the rate of 1.8% for 1937, and 2.7% after December 31, 1937. Future rates are to be based on benefit experience.

The National Social Security Act, Title IX, levies a tax on every employer (with stated exceptions) of eight or more. Payments covering the 1936 calendar year were 1%, due January 1, 1937. For 1937 the rate was 2%; and 3% thereafter. The term "employment" excludes agricultural labor, domestic services in private homes, and other small classes.

Allowable credits are provided by Sec. 1102. Against the tax so imposed, the amount of contributions (with respect to employment during the taxable year paid by such taxpayer into any unemployment fund under a state law having the approval of the National Social Security Board) not to exceed 90%, may be deducted by the taxpayer.

Effect of these provisions is this: The Arkansas rate for 1937, being 1.8%, and the Federal rate being 2%, the taxpayer in reporting to the Federal Government took credit for the payment made to the State, and remitted two tenths of one per cent to Washington. For 1938 credit was taken for 2.7%, and three tenths of one per cent was sent to the Federal treasury.

All remittances on pay rolls involving less than eight persons, made directly to the Unemployment Compensation Division of the Arkansas Department of Labor, go into the treasury at Washington and earn 3% interest. Remittances on pay rolls of eight or more covering the tax assessed by Act 155, although made to the State Unemployment Division, are likewise sent to the National Treasury and become a trust fund for the benefit of employees within the classification of eight or more. If there be no state unemployment compensation law of a character meeting approval of the National Social Security Board, the full amount levied under Title IX is collected by the Federal Bureau of Internal Revenue and is deposited generally in the U. S. Treasury without credit to the state wherein the collection is made.

Appellant admits it was liable to the United States for unemployment compensation tax levied under Title IX of the Social Security Act, and that such tax has been paid.

The three questions for determination are:

(1) Did the Federal Government authorize the State to assess and collect taxes of the character herein discussed?

(2) Is appellant a governmental instrumentality or agency, and therefore excused?

(3) Are appellant's employees independent contractors?

By Act of March 3, 1891, the Congress of the United States extended the Federal Government's consent "* * * for the taxation, under the authority of the laws of the state of Arkansas applicable to the equal taxation of personal property in that state, as personal property (of) all structures and other property in private ownership on the Hot Springs Reservation".

*Ex Parte Gaines*, decided more than a year after Congress had extended the authority just referred to, declared the law to be: "When the Government parts with its title, or any interest therein, the property or interest which the Government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property * * * The interest of the lessee in the land is not the property of the United States, and it is not a means employed by the Government to obtain a government end. The power to tax that interest does not involve, therefore, the power to destroy or disturb any interest of the United States Government."

The tax laid by Act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax. But the Congress seemingly intended (and this construction is strengthened by the Gaines Case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the

right to enforce restrictions under the Federal laws and under rules promulgated by the Interior Department.

Lands were leased; and individuals, corporations, partnerships, etc., were permitted to erect buildings and to engage in activities for profit and amusement. Healing properties of the medicinal waters were recognized, and the use of such waters was circumscribed in order that opportunity might be afforded the public to enjoy the benefits.

But the Government, *per se*, did not engage in the business of operating appellant's bathhouse. On the contrary, it leased the site and fixed the fees to be charged by operators. The extent to which such regulations were carried is shown in the second footnote to this opinion.

Constitutionality of the National Social Security Act was assailed in *Stewart Machine Company v. Davis*. The controversy reached the Supreme Court of the United States, where in an opinion written by Mr. Justice Cardozo it was said:

> "The tax which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment."

*Carmichael v. Southern Coal Company* is another case in point. The opinion, written by Mr. Justice Stone, contains the following statements:

> "This court has long and consistently recognized that the public purposes of a state, for which it may raise funds for taxation, embrace expenditures for its general welfare * * * The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it and not to the courts, is committed the duty and responsibility of making choice of the possible methods * * * When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be

defeated because the execution of it involves payments to individuals."

Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted from have been cited.

The Legislature had the right to require that employers make contributions in the manner provided by Act 155. The National Social Security Act denominates the contribution "an excise tax levied on employers". That the required payment is referred to in our Act 155 as a "Contribution" is of no significance. It is a compulsory contribution, and therefore a tax.

In its original sense an excise was something cut off from the price paid on a sale of goods, as a contribution to the support of the government. In its broader meaning it now seems to include every form of taxation which is not a burden laid directly upon persons or property—every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.

In *State v. Handlin* it was said (with respect to the inheritance Act of May 17, 1907):

> "We • • • hold that the tax provided by this Act upon the privilege of succeeding to inheritances and estates was well within the power of the legislature to impose, being included within its express powers to 'tax privileges in such manner as may be deemed proper'."

Quoting from Judge Cooley, Chief Justice McCulloch said:

> "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional

limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes."

Individuals, firms, and corporations engaged in business are privileged to do so because of the protection extended by government. Enforcement of contracts generally is a matter of constant judicial address. The State's welfare is best served when those of its citizens who must labor are able to find employment at profitable wages and in healthful surroundings. The contribution exacted by Act 155 becomes cumulative for use when the worker finds himself industrially adrift. His misfortune is not one affecting the individual alone. It extends to the entire community. If unemployment cannot be avoided, at least its tragic consequences can be ameliorated. Such is the purpose of the statute in question.

In the intsant case, if it be urged that the tax is laid against the privilege of paying employees, or upon the right of an employer to engage labor (and therefore unrelated to personal property as appellant insists and beyond the grant of authority expressed in the Act of 1891, and not to be reasonably implied from the nature of the grant); the answer is that the Federal Government has enacted a similar tax; and appellant, having more than eight employees, comes within the classification from which unemployment compensation is exacted. We are asked to say that the Congress has not conferred upon Arkansas the right to impose the excise in question, while at the same time the National Social Security Act imposes a similar tax on employers in each of the forty-eight states. Conceding, as we must, that authority of the State to collect the tax does not come from the Social Security Act of Congress, yet the power conferred by Act of 1891 to tax personal property impliedly carried with it the right to tax the use of such property to the same extent and in manner similar to property not within the Reservation.

It is next insisted by appellant that it possesses all of the characteristics necessary to classification as a governmental agency or instrumentality, and, as such, is exempt from the tax.

The rule announced in Cooley on Taxation is that "A corporation cannot escape state taxation merely because it was created by the federal government, nor because it was subsidized by it, nor because it was employed by the federal government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States."

Imposition of the tax here does not in any sense interfere with the Government's business. On the contrary, the expressed social policies of the government are sustained and promoted.

Finally, appellant urges that its employees are independent contractors. In its complaint it alleged they were employees. There was a declaration that "The employees, bath attendants and massage operators * * * are residents of the state of Arkansas, and * * * unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages, and commissions." If it now be urged that language of the complaint was inadvertent, still we think the record establishes the relationship of master and servant, and the point must be overruled. The means and methods by which the work was done were subject to directions of appellant.

Action of the chancellor in sustaining the demurrer to appellant's complaint was correct, and the decree dismissing the complaint is affirmed.

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 201

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BUCKSTAFF BATH HOUSE COMPANY,.....*Petitioner,*

vs.

ED I. MCKINLEY, as Commissioner of the Department of Labor of the State of Arkansas, et al.,.....*Respondent.*

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## APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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## BRIEF FOR PETITIONER

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CENTRAL PRINTING CO., LITTLE ROCK

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## OPINION OF THE SUPREME COURT OF ARKANSAS

The opinion of the Supreme Court of Arkansas has not appeared in the bound volumes of the reports of that Court or in the Southwestern Reporter. It will be found in Arkansas Law Reporter, Vol. 70, No. 1, p. 1, delivered April 10, 1939.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked have been set out in the statement as to jurisdiction, heretofore filed by appellant in compliance with Sec-

tion 1 of Rule 12, namely, that the Supreme Court of Arkansas erred in holding that Act No. 155 of the General Assembly of Arkansas for the year 1937 applied to the operation of appellant, which operations were confined solely to the Hot Springs National Park Reservation, in that jurisdiction over the area had been ceded to the United States by the State of Arkansas under Act No. 30 of the General Assembly of 1903, and accepted by Act of Congress of April 20, 1904, which opinion it was claimed was in error in holding that the State of Arkansas reserved the right to tax the use of personal property within the Reservation; that the Act of Congress of March 3, 1891, in extending the right to tax personal property used on the Reservation, impliedly extended the right to tax its use, and that the State of Arkansas was not prohibited by Acts of Congress of March 3, 1891, and of April 20, 1904, from levying and collecting the tax on the privilege of employment within the Reservation area; and in holding that the State of Arkansas was not limited to taxation of personal property under the agreement entered into between the United States of America and the State of Arkansas respecting jurisdiction, as reflected by said Acts (R. 24-26), which decision it was claimed was in violation of statutes of the United States and repugnant to the laws of the United States.

## STATEMENT OF THE CASE

Act No. 155 of the General Assembly of the State of Arkansas levied on all employers in the State of Arkansas a contribution of 1.8% of the wages paid employees during the calendar year of 1937, to create a fund for unemployment compensation. Appellant paid its unemployment contribution for that period to the Collector of Internal Revenue of the United States under Title IX, par. 901, of the Act of Congress of August 14, 1935 (49 Stat. 639). The State of Arkansas, acting through Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas, attempted to collect this assessment, and appellant applied to the Pulaski Chancery Court on petition to restrain its collection, alleging that the State of Arkansas had surrendered jurisdiction of the area in which the services were performed, reserving only the right to tax the personal property of individuals situated in the area (R. 1),

to which petition a general demurrer was filed, and the Chancery Court dismissed the petition, without opinion, for want of equity (R. 10).

Petitioner appealed to the Supreme Court of Arkansas, which is the highest State Court, and there on the 10th day of April, 1939, the order of the Pulaski Chancery Court was affirmed (R. 11). Within the time allowed by law a petition for rehearing was filed and by order of the court denied on the 23rd day of May, 1939 (R. 21), the judgment at that time becoming final. Application was made to the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, for an appeal to this Court, which was granted, and on the 9th day of October, 1935, the appeal was dismissed for want of jurisdiction. Treating the appeal as a petition for writ of *certiorari*, in accordance with Section 237(c), Judicial Code, as amended, *certiorari* was granted. (R. 28.)

## SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Petitioner's assignment of errors was incorporated with its petition for appeal to this Court and prayer for reversal. The errors assigned appear on pages 24 to 26 of the Record. The four assignments are interrelated and bear directly upon the question as to whether or not petitioner's employment of persons confined solely to the Hot Springs National Park Reservation could be taxed under Act No. 155 of the General Assembly of Arkansas for the year 1937. In view of the fact that jurisdiction of that area had been ceded to the United States by Act No. 30 of the General Assembly of Arkansas for the year 1903, reserving only the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by Act of Congress approved March 3, 1891 (26 Stat. 844), which Act of March 3, 1891, extended to the State the right to tax "under the authority of the laws of the State of Arkansas applicable to equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," which cession was accepted by Act of Congress of April 20, 1904, c. 14, par. 1 33 Stat. 187,

embracing by reference the provisions of the Act of March 3, 1891, *supra*, relative to taxation.

Our argument will be based upon all of the assignments of errors, and they are as follows:

The Supreme Court of Arkansas erred in holding and deciding:

I.

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax the use of personal property within the Hot Springs National Park Reservation.

II.

That the Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844, and the Act of Congress of April 20, 1904, 33 Stat. 187, 16 USCA, pars. 372-383, by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership in the Hot Springs National Park Reservation, impliedly extended the right to tax the use of such personal property.

III.

That the State of Arkansas was not prohibited by Act of Congress of March 3, 1891, and Act of Congress of April 20, 1904, from levying and collecting a tax on the privilege of employment on the Hot Springs National Park Reservation.

IV.

That by the agreement entered into between the United States of America and the State of Arkansas respecting jurisdiction of the area embraced in the Hot Springs National Park as reflected by Acts of Congress of April 20, 1832, c. 70, 4 Stat. at L. 505; Dec. 16, 1878, c. 5, 20 Stat. 258; March 3, 1891, and April 20, 1904, and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation as personal property, of structures and personal property in said area.

# SUMMARY OF POINTS AND AUTHORITIES

## I.

**The Social Security Act of Arkansas (Act No. 155 of 1937) is an excise tax on the relation of employment, and in no sense a property tax.**

*Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548.

## II.

**A State is prohibited from levying an excise, occupation or privilege tax on activities conducted beyond its borders or jurisdiction.**

*Wachovia Bk. & Tr. Co.* v. *Daughton*, 272 U. S. 567.

*James* v. *Dravo Contracting Co.*, 302 U. S. 134.

## III.

**The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas and is completely beyond its jurisdiction, with the sole exception of the right to tax as personal property the buildings and structures thereon and the personal property of individuals situated in the area.**

*Arlington Hotel Co.* v. *Fant*, 278 U. S. 439.

*Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517.

*Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525.

*Hot Springs Cases—Rector* v. *U. S.*, 92 U. S. 698.

*James* v. *Dravo Contracting Co.*, 302 U. S. 134.

*Williams* v. *Arlington Hotel Co.*, 22 F. (2d) 669.

*Yellowstone Nat. Park Transportation Co.* v. *Gallatin County*, 31 F. (2d) 644.

*Ex Parte Gaines*, 56 Ark. 227.

## IV.

**The construction to be placed on acts of cession and acceptance of lands acquired by the United States within the geographical limits of a State, is the same as applied to an ordinary contract between individuals, with a strict construction against neither.**

*Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517.

*James* v. *Dravo Contracting Co.*, 302 U. S. 134.

*Davies* v. *Hot Springs*, 141 Ark. 521.

*Merchants Transfer & Whse. Co.* v. *Gates*, 180 Ark. 97.

## ARGUMENT

It is undisputed that petitioner's sole operation and only place of business is located on the Hot Springs National Park Reservation and that all employment is limited to services performed in its bath house situated on the Reservation, and the sole question to be determined in this case is whether or not the State of Arkansas has jurisdiction to assess and collect a tax or contribution on that employment. It is further undisputed and admitted by the demurrer that a tax or contribution for this employment for the year 1937 was paid to the Collector of Internal Revenue under Title IX, par. 901, of the Act of Congress of August 14, 1935, 49 Stat. 639, relating to unemployment compensation.

### I.

**The Social Security Act of Arkansas (Act No. 155 of 1937) is an excise tax on the relation of employment and not a property tax.**

This Court has held, in the case of *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548, at page 578, in defining the nature of the tax or contribution, that it is not a property tax but in the nature of an excise, duty or impost, giving the following definition:

> "The tax which is described in the statute as an excise, is laid with uniformity throughout the United

States as a duty, an impost or an excise, *on the relation of employment.*"

The Supreme Court of Arkansas, in its opinion in this case (R. 16), said:

> "The tax laid by Act 155 is not a tax on personal property nor is it in any sense a property tax."

and since no contention is made that it is a property tax, examination of the reciprocal acts of Congress and of the Legislature of the State of Arkansas must be made to determine the authority or lack of authority for its imposition.

## II.

**The state is prohibited from levying an excise, occupation or privilege tax on activities conducted beyond its borders or jurisdiction.**

We believe that it will not be contended that this proposition of law is universal in its application and that the statement is supported by this Court's ruling in the case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

## III.

**The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas and is completely beyond its jurisdiction, reserving to the state only limited taxing power.**

A brief history of the lands in question might be helpful in arriving at the intent of the contracting parties as expressed by the reciprocal acts, most of which history is contained in the Hot Springs Cases of *Rector, and others*, v. *U. S.*, reported in 92 U. S. 698. These cases were on appeal from decisions of the Court of Claims under the provisions of an Act of Congress of May 31, 1870, 16 Stat. at L. 149, wherein the appellants were seeking to establish title to lands in the area of the Hot Springs Reservation, which included the particular land under discussion.

All of the State of Arkansas was included in the Louisiana Purchase in the year 1803, of which the Court takes judicial notice, and was the property of the United States,

both as proprietor and sovereign, until Arkansas was admitted to the Union as a State in 1836. The waters were known to have curative powers, and were commented upon as being remarkable in a message to Congress by Thomas Jefferson in 1806, in which message this locality was described, and which is noted in the opinion of Mr. Chief Justice Taft in the case of *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439. As early as 1810 these springs were frequented by invalids, at which time the area was claimed by the Quapaw Indians. It was ceded to the United States under a treaty with the Quapaw Indians in 1818, but a public survey was not made until 1838, two years after the admission of Arkansas to the Union.

By Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3, the hot springs, together with four sections of land, with the springs as nearly in the center as possible, were reserved to the future disposal of the United States, providing that the lands should not be entered, located or appropriated for any purpose whatever. No reservation, however, was made of the jurisdiction over the area when Arkansas was admitted in 1836, and whether the omission to make the reservation was by reason of oversight or intent, it follows that the State of Arkansas acquired sovereign jurisdiction subject only to the proprietary interest of the United States in the ownership of the fee. Nevertheless, the United States apparently claimed jurisdiction as sovereign as distinguished from proprietary interest in the area, as reflected by the Acts of Congress of December 16, 1878, c. 5, 20 Stat. 258, and March 3, 1891, c. 533, par. 5, 22 Stat. 844, which latter Act in extending taxation privileges is inconsistent with the mere proprietary interest. The State of Arkansas, as late as 1903, at the time of the passage of Act No. 30 of the General Assembly of the State, acquiesced in this apparent claim of sovereign jurisdiction over the land in question in that by the passage of the Act the Legislature referred to the right to tax which had been extended by the Act of Congress of 1891. There was, therefore, a jurisdictional controversy which the United States and the State of Arkansas attempted to adjust by these reciprocal acts.

The dispute over jurisdiction, even though the United States was not a party, resulted in the necessity for a decision by the Supreme Court of Arkansas in the case of *Ex Parte Gaines*, 56 Ark. 227, in 1892, and as a result of this decision it is evident that the cession Act (Act No. 30) of Arkansas was enacted in 1903. The case of *Ex Parte Gaines* arose over the levy of a tax against the leasehold interest of a lessee in lands embraced within the particular description of Act No. 30 of Arkansas for 1903, in which case the Supreme Court of Arkansas held that whatever interest the United States, as proprietor, had parted with was subject to taxation.

In accordance with the cases beginning with *Ft. Leavenworth Ry. Co.* v. *Lowe*, 114 U. S. 525, and ending with *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517, which will hereafter be discussed, the Supreme Court of Arkansas was correct in its decision. The Court, however, as reflected by its opinion at page 231, apparently was mistaken in the provisions of the Act of Congress of 1891 referred to, for regardless of whether or not Congress had the authority to grant the right to tax, the Act did not purport to extend to the State the right to tax the *leasehold interest*, but it in effect severed the building from the freehold and converted it to personal property.

If the United States had sovereign jurisdiction over the area, which was the subject of the legislation, this specific grant would necessarily have excluded the leasehold interest, and evidently that was exactly what Congress intended to do in the light of its Acts of April 20, 1832, and December 16, 1878, referred to in the foregoing assignments of errors.

In accordance with the ruling in *Ft. Leavenworth R. Co.* v. *Lowe, supra*, the interest of the United States in the lands in question was that of a proprietor until the passage of Act No. 30 of the State of Arkansas by the General Assembly in 1903. The lands in the Ft. Leavenworth area, which later became a part of the State of Kansas, likewise were a part of the Louisiana Purchase, and Kansas, like Arkansas, was admitted to the Union without specific reservation of sovereign jurisdiction of the area. At a later date

the State of Kansas ceded jurisdiction, reserving the right to tax "railroad, bridge and other corporations."

In resisting the tax imposed on the appellant in the Ft. Leavenworth case, it was contended that the reservation of the right to tax was invalid in that it infringed on the rights which the United States acquired along with lands secured under the provision of Article I, Section 8, of the Constitution of the United States. This Court held, at page 539 of the opinion, that the reservation of the right to tax was valid, "it not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post." At page 541, this Court said:

> "The State and general government may deal with each other in any way they may deem best to carry out the purposes of the Constitution."

and,

> "As instrumentalities for the execution of the powers of the general government they are, as already said, exempt from such control of the States as would defeat or impair their use for these purposes; and if to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State."

This suggestion by the Court was at a later date put into effect by the Legislature of the State of Kansas.

If, therefore, the State of Arkansas prior to the Cession Act had the right to tax any property of any individual, leasehold or otherwise, the grant to the State of the right to tax "under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in private ownership on the Hot Springs Reservation," was a vain and meaningless act. The justification for it can be found solely in the claim of the United States to sovereign jurisdiction. But, mistaken or otherwise, this was the very thing about which the parties were contracting, and at the

time of the passage of the Act by the General Assembly of the State of Arkansas, this State operated under its Constitution of 1874, which is set forth in Vol. I, p. 1, of Pope's Digest of the Statutes of Arkansas.

Article XVI, par. 5, provides:

> "All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper. * * *"

This provision of equality of taxation applies only to real and personal property and was the thing referred to in the Act of Congress of March 3, 1891, in its efforts to grant limited taxing power to the State of Arkansas.

There were two classifications of subjects for taxation under the Constitution of Arkansas at the time of the passage of the Acts of Congress of March 3, 1891, and April 20, 1904, and the Cession Act of Arkansas of 1903, one being real and personal property; the other, hawkers, peddlers, ferries, exhibitions and privileges.

It was required that the tax levied against real and personal property be equal and uniform; there was no provision for equality or uniformity in the taxation of hawkers, peddlers, ferries, exhibitions and privileges. These Acts of cession and acceptance have used the particular words of the Constitution of Arkansas applicable only to the taxation of real and personal property, thereby limiting taxation in the Hot Springs Park Reservation to that classification of taxation. The existence of the right to tax privileges, which includes the use of property, was known to each of the parties to the compact, the United States and the State of Arkansas, as expressed by the reciprocal Acts, and if the right to tax a use had been intended, one of the Acts would

have embraced it. Without applying any rule of strict construction, it is evident that by the specific mention of one classification the other, that is, the use tax, was excluded.

The Supreme Court of Arkansas, in the case of *Davies* v. *Hot Springs*, 141 Ark. 521, in which case it was claimed that a privilege or occupation tax had been assessed discriminatorily and without equal application to all occupations was void, said (p. 526):

> "It is claimed, however, that the statute provides an unjust and discriminatory method of classification which renders it void. In consideration of that question, it must be remembered that the provision of the Constitution *with respect to uniformity in taxation* applies only to a property tax, and has no reference to the taxation of privileges. * * *"

The Cession Act of Arkansas, after granting exclusive jurisdiction over the area in question, contained the customary reservation of the right of execution of process, either civil or criminal, and the specific provision of the reservation of the "right to tax all structures and other property in private ownership * * * accorded to the State by the Act of Congress approved March 3, 1901," the date of 1901 being either an error of the printer of the official Acts or an oversight of the drafter of the Bill, since the Act referred to is that of 1891.

The cession of these lands was accepted by the United States under Act of Congress of April 20, 1904, 33 Stat. 187, specifically embodying by reference and implication the provisions of the Act of March 3, 1891. These Acts of Congress and the provisions of the Constitution of the State of Arkansas are set forth in the Appendix to this brief.

Reading the Act of Congress, the Act of the Legislature, and the provisions of the Constitution of Arkansas of 1874 together, to determine the intent of the parties, which rule of construction is axiomatic, we feel that the reservation of the right to tax extended only to personal property and the building severed from the freehold and arbitrarily invested with the character of personal property,

all other jurisdiction and all other taxing power passing to the United States under the Cession Act.

If this be the correct interpretation of the wording of the contracts expressed by the Acts in the light of the attendant circumstances and the intentions and contentions of the parties, it only remains to determine whether or not the United States and the State of Arkansas had the power to enter the contract.

The case of *Ft. Leavenworth R. Co.* v. *Lowe, supra,* it was held that the United States could accept restricted jurisdiction of lands for public use such as this under consideration.

In the case of *Williams* v. *Arlington Hotel Co.*; 22 F. (2d) 669, decided by the Circuit Court of Appeals on October 17, 1927, sovereignty over the particular lands in question was in issue. The Arlington Hotel was located on the Reservation, and it was destroyed by fire. Baggage belonging to appellant was destroyed in that fire, and an action was instituted for its value. The liability of an innkeeper as that liability existed in Arkansas prior to cession of the area in 1903, was that of an insurer. Subsequent to 1903, the Legislature of the State of Arkansas reduced the innkeeper's liability to that which would be the result of negligence. The United States District Court held that the latter measure of liability applied, which decision was reversed on the appeal. The Court held that the liability of the innkeeper was that existing prior to cession of the area, regardless of whether or not the particular portion of the land was being put to governmental use, and that the jurisdiction depended on construction of the Acts of cession and acceptance. Mr. Justice Field, at page 670 of the opinion, said:

> "If the land is not acquired under the above constitutional provision" (Art. I, par. 8) "the State may cede such jurisdiction as it sees fit to the Government, and that the extent of the jurisdiction of the Government depends on the terms of such cession."

In the case of *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, decided by this Court on February 18, 1929, the same question was involved as in the Williams case, *supra.* Quot-

ing with approval from the case of *Ft. Leavenworth R. Co.* v. *Lowe,* at page 451 it was said:

> "But the Court further held that when a formal cession was made by the State to the United States * * * the State and the Government of the United States could frame the cession and acceptance of governmental jurisdiction so as to divide the jurisdiction between the two as the two parties might determine, provided only they save enough jurisdiction for the United States to enable it to carry out the purposes of the acquisition of jurisdiction."

This Court held that over the area in question, which is the same as that involved in this appeal, the jurisdiction of the United States was supreme and exclusive with the exception of the reservation of the right to tax in the Cession Act of Arkansas of 1903. The decision of the Court was that liability existed for the destruction of the baggage by fire under the provisions of the innkeeper's liability existing before cession by the State of Arkansas in 1903.

In the case of *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. (2d) 644, the area had been ceded to the United States, reserving only the right of service of process, etc., in which the Court said (p. 645):

> "In other words, after the date of cession the ceded territory was as much without the jurisdiction of the State making the cession as was any other foreign territory, except insofar as jurisdiction was expressly reserved."

In the case of *Collins* v. *Yosemite Park & Currie Co.,* 304 U. S. 517, the State of California in the enforcement of its "Alcoholic Beverage Control Act" attempted to collect a tax on the sale of liquor within the Yosemite Park area, and to impose a license for its sale by the Park Company in that area.

The jurisdiction of the United States over the lands in question and the reservation of the taxing power arose under circumstances similar to the present case. The lands were acquired in 1848 by the United States from Mexico and a proprietary interest only was reserved on the admis-

sion of California to the Union in 1850. It was ceded to the United States in 1891. The valley was re-ceded to the United States in 1905 and accepted by Congress in 1906.

California however reserved, in addition to the service of process, etc., the right to tax "persons and corporations, their franchises and property," which reservation was held to apply to the sales tax but not to the regulatory feature of license under the California Alcoholic Beverage Control Act. It will be noted that the reservation by its own terms is much broader than the reservation in the cession of the lands in question by the State of Arkansas. But this case settled the question of whether or not the United States could accept by cession from a State jurisdiction less than exclusive, which question had been raised in the case of *Arlington Hotel Co.* v. *Fant, supra,* but not decided, and which was assumed in the case of *Yellowstone Park Transportation Co.* v. *Gallatin County, supra.* It is now, therefore, determined that such qualified jurisdiction can be accepted under the provisions of clause (17), paragraph 8, Article I, of the Constitution of the United States, and the only inquiry is directed to the meaning of the Acts of cession and acceptance constituting the compact between the State and the United States. In that opinion at page 528 the method of interpretation is indicated in this statement:

> "Whatever the existing status of jurisdiction at the time of their enactment, the Acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park. * * * The States of the Union and the national Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the Court will recognize and respect."

We contend that under the authority of these cases the jurisdiction of the right to tax any of the petitioner's operations is vested exclusively in the United States with the exception of that of the State of Arkansas to tax personal property on the Reservation and buildings as personal property.

## IV.

**The construction to be placed on acts of cession and acceptance of lands acquired by the United States within the geographical limits of a state is the same as applied to an ordinary contract between individuals, with a strict construction against neither.**

In support of our contention that the construction to be placed on Acts of cession and acceptance of land acquired by the United States within the geographical limits of the State, is that construction applied to ordinary contracts between individuals, with a strict construction against neither, and that the Courts of the United States have adopted such a rule of construction, with which the decision in the instant case is in conflict, we rely on the cases of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517.

In the case of *James* v. *Dravo Contracting Co., supra,* the United States had acquired lands on the banks of the Kanawha River in the State of West Virginia, to be used in connection with the construction of locks and dams in the bed of that river, which was navigable. These lands were acquired under authority of an Act of the Legislature of the State of West Virginia granting permission for their acquisition and reserving concurrent jurisdiction to the State not inconsistent with the Federal purposes.

The Co[illegible]acting Company, in the erection of the locks and dams, fa[illegible]icated a part of the material at its main plant in Pennsylvania. A part of the remaining work was done on the lands acquired by the United States under the terms of the State statutes. The State of West Virginia levied an occupation or privilege tax against the operations of the contractor based on the gross receipts for the construction work. This Court held that the tax was not collectible on

that portion of the work done in the Pennsylvania plant of the Company, but that, construing all of the Acts of the Legislature of the State of West Virginia on the subject of acquisition of lands by the United States, as a whole, the concurrent jurisdiction retained for taxation by the State was not in conflict with or a burden on the Federal purposes, and that the tax was collectible on that portion of the operations.

With reference to construction we quote from the opinion at page 142:

> "Clause 17 governs those cases where the United States acquires land with the consent of the Legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction."

The facts and citations from the case of *Collins* v. *Yosemite Park & Currie Co., supra,* are set out above.

## CONCLUSION

The construction which the Supreme Court of Arkansas has placed on Act No. 30 of the General Assembly of Arkansas of 1903 and the Acts of Congress of March 3, 1891, and April 20, 1904, completely nullifies the effect of each and is in conflict, at least in spirit, with the interpretation placed on the acts by the United States courts in the cases of *Arlington Hotel Co.* v. *Fant,* and *Williams* v. *Arlington Hotel Co., supra,* in that it was the State which reserved limited jurisdiction, and not that the United States acquired only limited jurisdiction of the area. The decision of the Supreme Court of Arkansas nullifies the effect of the aforesaid Acts in this respect, that it fails to recognize that a change in the legal status of the right to tax in the area existed after the Cession Act of Arkansas of 1903.

After the admission of Arkansas to the Union, without reservation of jurisdiction of these lands, the State's right to tax any property or any interest in property of individuals on the Reservation cannot be questioned. This, of course, is with the exception of property which might be in governmental use and which under the particular facts might constitute an interference with governmental activities, the validity of which tax under the circumstances would be determined by another line of decisions of this Court. The case of *Ex parte Gaines, supra*, announced this principle of law. Subsequent to the decision in the Gaines case, the Act of cession of Arkansas of 1903 was passed. It necessarily intended to change the existing situation with reference to taxation in the area. It is a rule of construction of statutes in this State that the Legislature is presumed in the passage of an act to have in mind prior decisions of the courts on the subject in ascertaining its meaning.

In the case of *Merchants Transfer & Whse. Co.* v. *Gates*, 180 Ark. 97, at page 102 that Court said:

> "It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in the light of all judicial decisions relating to the same subject."

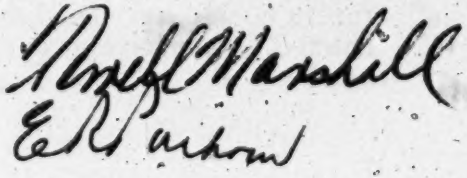
If, therefore, under the decision in the Gaines case the State of Arkansas had the supreme right of taxation of individuals on the Reservation, of necessity the Legislature must have intended to surrender that supreme right and to limit the taxation to that which the United States intended to be conferred by the Act of Congress of March 3, 1891. Any other construction of the Act would amount to only a legislative sanction of a judicial decision of its Court. It is consistent with reason that United States, having acquired jurisdiction and control over the area in question for a particular purpose, used the words in the Act of 1891 in the sense that they were used in the Constitution of the State of Arkansas, for while property taxes might not interfere with the use to which the lands were put, taxation of privileges and uses might seriously interfere with the governmental operation, which was solely making use of the waters for the general public good.

The decision in the present case, in upholding the use or excise tax, in effect changes the wording of the Act of Congress of March 3, 1891, to an extention of the right to tax persons and corporations, their franchises and property, for we can conceive of no limitation of the taxing power of the State under this decision. It places the taxing power of the State exactly as it existed prior to the Cession Act of Arkansas of 1903, and the acceptance Act of Congress of April 20, 1904.

We have examined the Social Security Act of Congress of August 14, 1935 (49 Stat. 620) to the best of our ability, and we are unable to find any cession to the States of a right to tax employment within the National Park areas or other United States Reservations under State Social Security Acts which it was contemplated would be passed. This may have been the result of an oversight in the drafting of that Act, but it nevertheless exists. It may have been purposely omitted because there was no compulsory provision for a State within the boundaries of which the Reservation might have been located to pass a State Social Security Act. We feel that the omission was due to an oversight in drafting that Act, because since its passage in 1935 Congress, by amendment, has extended to the States the right to levy a social security tax in this and other National Park areas and Reservations, effective 1940. This, at least, indicates that the United States, one of the parties to the compact, did not think that the right to levy the assessment existed prior to the passage of this amendment on August 10, 1939. (Internal Rev. Code Sec. 1606.)

We respectfully contend that the decision in the present case should be reversed.

TERRELL MARSHALL,
E. R. PARHAM,
*Counsel for Petitioner.*



# APPENDIX

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"SECTION 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Constitution of Arkansas (1874), Art. XVI, par. 5:

"All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

"The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

"Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

"The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * *. Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * * And provided, further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 201

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BUCKSTAFF BATH HOUSE COMPANY ..... *Petitioner,*

v.

ED I. McKINLEY, as Commissioner of the Department of Labor of the State of Arkansas, et al., ..... *Respondent.*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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## REPLY BRIEF FOR PETITIONER

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*Counsel for Petitioner.*

CENTRAL PRINTING CO., LITTLE ROCK

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

---

## REPLY BRIEF FOR PETITIONER

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## STATEMENT

Petitioner directs this reply to the contention of the respondent that no justicable controversy is presented by appellant, as discussed on pages 3 to 8, inclusive, in the brief of respondent.

## ARGUMENT

This Court has held in the case of *Maryland Casualty Co. v. U. S.*, 251 U. S. 342, at page 349:

> "It is settled by many recent decisions of this Court that a regulation by department of government,

addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with the express statutory provision."

The levy of unemployment compensation of 1.8% upon wages during the year 1937 by the Legislature of the State of Arkansas is of course an amount equivalent to 90% of the levy for similar purposes by the United States, and if it could have been deducted without question or doubt on the Federal return, of course it would have been immaterial to whom the tax was paid, since petitioner in no event would have suffered any loss and there would have been no issue to submit to this Court other than an abstract principle of law.

Petitioner, however, was not at that time in such a fortunate circumstance, for it was then advised of the Departmental ruling and furnished with a copy of the opinion of the General Counsel for the Social Security Board, which is set out at page 17 of the Appendix of the brief for the respondent. This Departmental ruling, whether erroneous and inapplicable, or not, nevertheless had the force and effect of law until such time as it might be rescinded or changed by positive statutory enactment. It cannot be said that at the time of its rendition it was positively and apparently in conflict with statutory enactment or prior court decision on the subject. To say the least, it was calculated to, and did, produce a substantial doubt in the mind of the petitioner as to its liability for contribution to the Arkansas State unemployment compensation fund, and a real and substantial doubt of the recovery of the amount so paid or its ultimate deductibility, if paid, in the face of this ruling.

Since the record does not show the status of the controversy after the decision by the Supreme Court of Arkansas, affecting the jurisdiction of this Court, we review the proceedings:

The original complaint was filed in the Pulaski Chancery Court on the 19th day of August, 1938, at which time the petitioner, if liable at all to the State of Arkansas for

unemployment contributions, was indebted in the amount of 1.8% of wages paid employees, plus 8% interest on past due contributions at the rate of 1% per month since January 1, 1938.

Section 8562, *Pope's Digest of the Statutes of Arkansas*, provides:

> "Contributions unpaid on the date on which they are due and payable as prescribed by the Commissioner shall bear interest at the rate of one per centum per month from and after such date until payment, plus accrued interest, is received by the Commissioner. * * *"

Petitioner on August 19, 1938, being a lessee of the United States, found itself in the position of a tenant involved in a dispute between the landlord and a third party over sovereign title to the land which it occupied, and the lessor's consent was lacking for the tenant to render rent or service to the State of Arkansas. It could not interplead the parties claiming sovereignty, and elected to resist the demand of the State of Arkansas rather than that of the United States, under which it held as lessee.

There was no change in the ruling of the Treasury Department of the United States relative to the permissibility of contribution to a State unemployment compensation fund until the Amendment to the Social Security Act of the United States approved August 10, 1939 [Act No. 379, Section 902 (a)], which was five months subsequent to the opinion of the Supreme Court of Arkansas on April 10, 1939 (R. 11), on which date of August 10, 1939, the petitioner, if answerable at all to the State of Arkansas for unemployment compensation, owed, in addition to the levy, an amount of 20% of the principal amount as interest and which interest was as much a part of the tax as the original 1.8% of wages paid. This date of August 10, 1939, was the first time on which the lessee was given permission to contribute to the State unemployment fund, and on this date the prior ruling of the Treasury Department became inoperative, since, as said in the case of *Maryland Casualty Co. v. U. S., supra*, it then became in conflict with an express statutory provision.

At a time after the first day of September, 1939, and before the 10th day of October, 1939, petitioner paid into the unemployment compensation fund of the State of Arkansas the original 1.8% of wages during the year 1937, which constituted only a partial discharge of the amount claimed to be due at that time, that is, 21% of the demand was not paid, and for which petitioner still is liable in the event it was amenable to the provisions of the Arkansas Social Security Act during the year 1937.

On the date of payment of the partial amount, the Treasury Department ruling had become inoperative by statute, as set out above, by the Amendment to the National Social Security Act, *supra*, but the amendment did not afford complete relief to the petitioner, in that a corrected return could be filed for only 90% of the amount paid into a State unemployment compensation fund. Therefore, 21% of petitioner's original liability, if any, was unaffected by said Amendment or its payment to the State of Arkansas and its subsequent amended claim filed for refund with the United States.

The respondent in its brief makes no contention contrary to this statement, and it is made for the purpose of clarifying the statement in respondent's brief at page 6 that 1.8% of wages during the year 1937 had been paid into the Arkansas unemployment compensation fund, from which this Court might infer full payment, when in fact a substantial amount of 21% of liability still existed, for which no claim for refund from the United States could be made. In other words, petitioner complied with the Amendment of August 10, 1939, only insofar as it afforded partial relief.

There is no provision under the Arkansas Social Security Act for waiver of interest due on contributions, nor is there any provision for an adjustment of this item of 21%, except that an application for adjustment may be made provided it is filed with the Commissioner not later than one year after the contribution became due.

Section 8552, *Pope's Digest of the Statutes of Arkansas*, provides:

"If not later than one year after the date on which any contributions or interest thereon became due, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof, because such adjustment cannot be made, and the Commissioner shall determine that such contributions or interest or any portion thereof was erroneously collected, the Commissioner shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made, the Commissioner shall refund said amount, without interest, from the fund."

At the time of the Amendment to the National Social Security Act, *supra*, making inoperative the Departmental ruling, this period of one year for application for refund had expired.

We cannot agree with the interpretation placed on Section 8 of the Arkansas Unemployment Compensation Act, which is Section 8556 of *Pope's Digest of the Acts of Arkansas*, in that petitioner could have elected to become an employer subject to that Act and by its election have any effect on the petitioner's status under the law of another sovereign. An election by the petitioner would have constituted nothing more than a voluntary contribution prohibited by the Treasury Department ruling, and in no event would the election be binding on the United States so as to force it to allow a credit or a deduction on its tax of 90%, and if sovereign jurisdiction has been surrendered by the State of Arkansas to the United States, this section could have no application over operations within the ceded area. This section relating to election is copied at length at page 5 of the brief of respondent.

## CONCLUSION

We submit that the Amendment of August 10, 1939, has not afforded complete relief to the petitioner; that there is a substantial amount of 21% of liability, under the decision of the Supreme Court of Arkansas, which is claimed but undetermined; and that this amount, exclusive of costs, is real and substantial, and presents a justicable controversy for this Court, and we respectfully contend that the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

TERRELL MARSHALL,
E. R. PARHAM,
*Counsel for Petitioner.*

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 201

BUCKSTAFF BATHHOUSE COMPANY.....Petitioner

vs.

ED. I. MCKINLEY, as Commissioner of the DEPARTMENT OF LABOR OF THE STATE OF ARKANSAS, et al.....Respondents

CERTIORARI FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

## BRIEF FOR RESPONDENTS

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CERTIORARI FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

## BRIEF FOR RESPONDENTS

### SATEMENT

The petitioner, Buckstaff Bathhouse Company, is a corporation organized and existing under the laws of the State of Arkansas. During the period beginning the 1st day of January, 1937, and ending the 31st day of December, 1937, it had in its employ fifteen persons engaged in performing services in the operation of a bathhouse. This bathhouse was constructed and operated under a written contract entered into by the Assistant Secretary of the Interior and the Buckstaff Bathhouse Company on August 5, 1931. The land upon which the bathhouse is located is within the Hot Springs National Park.

Petitioner paid the unemployment compensation, or excise, tax levied by Section 901 of the Social Security Act, approved August 14, 1935 (Section 1600 of Internal Revenue Code). It being the duty of the Commissioner of the Department of Labor of the State of Arkansas to enforce the provisions of Act 155 of the Acts of Arkansas of 1937, cited as the "Arkansas Unemployment Compensation Law", Sections 8549 to 8569, inclusive, of Pope's Digest, the Buckstaff Bathhouse Company was called upon to pay 1.8% of the wages paid to its employees as levied by Section 7 of the Arkansas Unemployment Compensation law, Section 8555 of Pope's Digest. The Buckstaff Bathhouse Company declined to pay the tax, insisting as an excuse for such nonpayment that it was not liable to the State for the reason that: First, the State's right to levy and collect such tax had been surrendered by certain acts of the Arkansas Legislature ceding jurisdiction to the Federal Government, (These acts are contained in Sections 5638, 5649, and 5651 of Pope's Digest, and are copied in full in the Appendix to this Brief; and Appellant's Brief); Second, that the Company was exempt because it was an instrumentality of the United States, expressly exempted in Section 2 (i), (6) (5) of the Arkansas Unemployment Compensation law, Section 8550 of Pope's Digest; and Third, because the persons to whom it paid wages were independent contractors. (R. 1-3).

This claim of non-liability was denied by the Commissioner of Labor and thereupon petitioner sought to enjoin the Commissioner from collecting the tax by a petition for restraining order filed in the Chancery Court of Pulaski County, Arkansas. That Court sustained a general demurrer to the complaint and the Supreme Court of Arkansas, on appeal, affirmed the Chancery Court decree.

As the Court has observed, the Supreme Court of Arkansas denied all three of appellant's claims of non-liability in an opinion appearing in the record, pages 11 to 20, inclusive.

It is now insisted by petitioner that the State is precluded from collecting unemployment compensation contributions from the employer, Buckstaff Bathhouse Company, because of the provisions of the various Acts of the General Assembly of Arkansas ceding jurisdiction.

We shall endeavor to answer the argument of petitioner in a discussion of the following propositions:

I. NO JUSTICIABLE CONTROVERSY IS PRESENTED BY APPELLANT.

II. THE RIGHT AND PRIVILEGE OF THE STATE OF ARKANSAS TO LEVY AND COLLECT UNEMPLOYMENT COMPENSATION TAX HAS NOT BEEN CEDED.

III. IF SUCH RIGHT TO TAX WAS CEDED, IT WAS RESTORED BY CONGRESS BY THE PASSAGE OF THE SOCIAL SECURITY ACTS.

## ARGUMENT

### I.

It is alleged in the complaint that was filed in the Pulaski Chancery Court that the levy of the tax of 1.8% upon wages paid the employees of the petitioner during the year 1937 "will irreparably damage the plaintiff for which it has no complete and adequate remedy at law". (R. 3).

As heretofore stated, petitioner paid to the Commissioner of Internal Revenue the excise tax of 2% upon the wages paid its employees during the year under the provisions

of Section 901 of the Social Security Act, Section 1600 of Internal Revenue Code. The Section immediately following in the Social Security Act provides that "The taxpayer may credit against the tax imposed by Section 901 the amount of contributions with respect to employment during the taxable year paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a state law. The total credit allowed to a taxpayer under this Section on contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90% of the tax against which it is credited, and the credit shall be allowed only for contributions made under the laws of states certified for the taxable year, as provided in Section 903".

It is therefore seen that the payment of the tax by the taxpayer into the unemployment fund of the State of Arkansas would not have resulted in an "irreparable injury", or any injury whatever. It would have received credit for the full amount as against the levy made by the Social Security Act, and paid by the employer.

It is true that on February 12, 1937, Thomas H. Eliot, General Counsel of the Social Security Board, wrote to the Acting Director of the National Park Service a letter, in which he stated that the Treasury Department had ruled that no credit would be allowed against tax payments to a State Fund made voluntarily by an employer without his becoming unqualifiedly subject to the State Act. (This letter is printed in full in the Appendix).

This ruling of the Treasury Department was probably erroneous, and was certainly inapplicable, but even if it were correct, and if it raised a doubt in the mind of the taxpayer as to its right to receive credit upon its Federal tax, the Arkansas Unemployment Compensation Law, in

Section 8, Section 8556 of Pope's Digest, provides as follows:

> "An employing unit, not otherwise subject to this Act, which files with the commissioner its written election to become an employer subject hereto for not less than two calendar years, shall, with the written approval of such election by the commissioner, become an employer subject hereto to the same extent as all other employers".

By a compliance with this provision of the Arkansas law, the taxpayer would have removed all doubt existing at the time it was requested to pay, as to its right to credit.

The act of making an election could have been exercised by petitioner at any time, and it would have received credit against the federal levy if such payment had been made prior to January 31, 1938.

The action in the Pulaski Chancery Court was not filed until August 19, 1938. At that time, as the law then provided, petitioner had lost its right to pay the 1.8% into the State Fund and receive full credit therefor as against the federal levy, but the right of petitioner to receive this credit was again extended by the Congress in the passage of the Amendments to the Social Security Act of 1939, and its approval on August 10, 1939. (Public Act No. 379, 76th Congress).

The Arkansas Supreme Court had, in the meantime, rendered its decision herein, which removed all doubt as to the liability of the taxpayer in this case to the State for the unemployment compensation tax, and Congress, in the last Act above-mentioned, reopened the right to receive credit by providing as follows:

"Sec. 902. (a) Against the tax imposed by Section

901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions with respect to employment during such year paid by him into the unemployment compensation fund under a state law. . . . .

(1) Before the sixtieth day after the date of the enactment of this act."

Sub-section (d) of the same Section provides:

"Refund of the tax (including penalty and interest collected with respect thereto, if any) based on any credit allowable under sub-section (a), (b) and (h) may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund".

In due time petitioner in this case, of course, took advantage of this provision of the Act of Congress and paid into the Unemployment Compensation Fund of the State of Arkansas the 1.8% of wages paid during the year 1937, and filed its application for refund.

Petitioner has not suffered any injury. It paid only such tax as was levied by the State after Congress passed Amendments to the Social Security Act, and it has received, or will receive, a refund from the United States Treasury for the full amount paid to the State, which does not exceed 90% of the federal levy.

Congress, by amending Section 901 of the Social Security Act, afforded petitioner, and all others that might have been in its position, the right to adjust all tax differences with state unemployment compensation agencies that arose prior to August 10, 1939, and then in the same Act, by amending Section 1606 of the Internal Revenue Code, it

forever set at rest all questions as to liability of such employers by the enactment of the following law:

> "*Section 1606 (d).* No person shall be relieved from compliance with the state unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any state shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such places were not owned, held, or possessed by the United States".

As the situation exists, the taxpayer in this case has suffered, and will suffer, no actual injury or damage because of the application and enforcement of the State statute. It is well established that an issue is not justiciable unless there is substantial injury or damage suffered, or about to be suffered, by him who seeks judicial relief. *Jeffrey Mfg. co. v. Blagg,* 235 *U. S.* 571, 575, 576; *Gorieb v. Fox,* 274 *U. S.* 603, 606; 32 *C. J.* 51, *Title,* "*Injunction,*" sub-title, "Irreparable Injuries."

In the case of *In re Knowles,* 295 *Pa.* 571, 145 *Atl.* 797, the Commonwealth of Pennsylvania was proceeding to enforce a statute imposing estate taxes. Such payment of taxes to the Commonwealth of Pennsylvania entitled the taxpayers to credit against taxes imposed by federal statute. The Court assumed that the State statute was contrary to the State Constitution but it held that such argument was not available to the taxpayer because he suffered no injury by paying State tax. The Court said:—

> "It is unnecessary to continue the discussion along this line, however, for none of the points of attack against the act of 1927, made by appellants, are involv-

ed in this case, since, as before said, appellants are in no wise injured by any provision of that statute; indeed, so far as the main feature of this act is concerned, it is difficult to perceive how it can harm any one taking estates or having an interest in estates taxed thereunder, because, in each instance, if the additional tax created by the act was not paid to the commonwealth, the same amount would have to be paid to the national government, and, when paid to the commonwealth, the amount in question is allowed by the national government to the estate making the payment. As this Court said in Gentile v. P. & P. Ry. Co., supra, it is of no moment to complainant whether the amount to be paid goes to one person or another, so long as his liability is not prejudicially altered; the same principle applies here.

See also Opinion of the Justices, 85 N. H. 522, 154 Atl. 633.

II.

The State of Arkansas was admitted into the Union by Act of Congress approved June 16, 1836. (Pope's Digest, Vol. 1, p. 262). It is conceded by appellant that the Act of Admission contained no reservation of jurisdiction in the Federal Government, and that such jurisdiction as the Federal Government has over the lands within the Hot Springs National Park is found only in the Acts of the General Assembly of the State of Arkansas above-referred to. Each of these Acts contains the following proviso:—

"This grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reserve or premises; Provided, further, that the right to tax all struc-

tures and other property in private ownership on the Hot Springs Reservation, accorded the State by the Act of Congress, approved March 3, 1891, is hereby reserved to the State of Arkansas."

Each of these Acts contains also the following limitation upon the exercise of jurisdiction by the United States:—"To be exercised so long as the same shall remain the property of the United States."

Prior to the passage of the Acts of the General Assembly ceding jurisdiction the State of Arkansas had full power and authority to tax all privately owned property. At the time of the passage of these Acts the State exercised only the right to tax property according to its assessed value. Up to the time of the passage of those Acts, and for many years thereafter, property within the Hot Springs National Park, could have been subjected only to an *ad valorem* tax. It was only the right of the State to levy and assess an *ad valorem* tax against the *real property* within the reservation that was ceded in these Acts of the General Assembly.

The Act of Congress of 1891 emphasizes the right of the State to collect all other taxes except *ad valorem* taxes on real estate, and serves to clarify the Acts of the General Assembly, for the Federal Act states:—"The consent of the United States is hereby given for the taxation under the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property of all structures and other property in private ownership on the Hot Springs Reservation." U. S. C. A. 365.

The State has not violated this agreement in levying an unemployment compensation tax against employers who are lessees of property within the Hot Springs National Park.

Petitioner concedes that the Supreme Court of Arkansas was correct in its opinion rendered on June 10, 1939, in the instant case, when it said: "The tax laid by Act 155 is not a tax on personal property, nor is it in any sense a property tax." The Court in that statement used the term "property tax" in its usual and customary sense of an *ad valorem* tax.

The Supreme Court of Arkansas was equally correct in the following statement found in the opinion:—"The power conferred by the Act (of Congress) of 1891 to tax personal property impliedly carried with it the *right to tax the use of such property* to the same extent and in the manner similar to property not within the Reservation." (R. 19).

This statement of the Arkansas Supreme Court is supported by the case of *Henneford v. Silas Mason*, 300 U. S. 577, in which it was stated:—"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." This same doctrine is found in the earlier case of *N. C. & St. L. Ry. v. Wallace*, 288 *U. S.* 249. "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements," and, it was also said in the case of *Corliss v. Bowers*, 281 *U. S.* 376, that:—"Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed, the actual benefit for which the tax is paid."

Petitioner has quoted Article XVI, Section 5 of the Constitution of the State of Arkansas of 1874, page 149, Vol. 1, Pope's Digest of the Statutes of Arkansas. The two sections immediately following are as follows:

"Section 6. All laws exempting property from taxation other than as provided in this Constitution shall be void."

"Section 7. The power to tax *corporations* and *corporate property* shall not be surrendered or suspended by any contract or *grant* to which the State may be made a party."

The State's right of taxation in the Hot Springs National Park was fully explained in *Ex parte Gaines*, 56 Ark. 227, 19 S. W. 602, wherein it is said:

"No part of the Reservation, while owned by the United States, can be subjected to taxation by the State. Van Brocklin v. Tennessee, 117 U. S. 151. But when the government parts with its title, or any interest therein, the property or interest which the government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property.

* * *

"The interest of the lessee in the land is not the property of the United States, and it is not a means employed by the government to obtain a governmental end. The power to tax that interest does not involve therefore the power to destroy or disturb any interest of the United States government."

* * *

"All property in Arkansas belonging to individuals is subject to taxation except such as is especially exempted by the Constitution. Nothing else is or can be

made exempt. Little Rock, etx. R. Co. v. Worthen, 46 Ark. 312. The interest which the appellant acquired by his lease was property, and is not exempt under the law. It was the duty of the assessor to return it for taxation."

The imposition of the unemployment compensation tax is not a charge upon any property within the Reservation, and certainly is not and can never be a charge upon the property of the United States. The obligation to pay the contributions is a personal one, operating *in personam*. The obligation is enforced only against the employer. The provisions for enforcing payment are contained in Section 14 (b) of the Unemployment Compensation law, Section 8562 (b) of Pope's Digest. These provisions merely give right to "a civil action in the name of the commissioner." The State in each of the Cession Acts reserved the right to execute any process of the State, civil or criminal, on any person who may be on such reserve or premises. The enforcement of the Unemployment Compensation law can, in any event, only affect the interest of the lessee. It was said by the Arkansas Supreme Court in the case of *Ex parte Gaines, supra*, that:—"The interest of the lessee in the land is not the property of the United States." Each of the Session Acts, as we have heretofore pointed out, provides that the jurisdiction of the United States is "to be exercised so long as the same shall remain the property of the United States."

The effect of the cases of *Williams v. Arlington Hotel Company*, 22 *F.* (2d) 669, and *Arlington Hotel v. Fant*, 278 *U. S.* 439, is not nullified by the decision of the Supreme Court in this case as counsel for petitioner argue. Those cases did not involve the taxation of personal property within the Reservation, or the taxation of privileges inci-

dent to the use of such structures. The acts involved in those cases were regulatory acts in which the state was attempting to exercise its police powers. Such regulations, of course, affected the Government's right to use its lands, and could have seriously hampered the Government in the exercise of its power to lease lands within the Reservation.

The distinction between the right of the state to impose a license fee and subject persons and property under the jurisdiction of the United States in its national parks to police regulations, and the right of the state to tax is made clear in the case of *Collins v. Yosemite Park & Curry Company*, 304 *U. S.* 517. In that case the Court held that, because the State of California had ceded exclusive jurisdiction to the United States over the Yosemite National Park area, it was without power to require certain operators within that area to comply with various conditions before the granting of a license, but a different conclusion was reached as to the right to tax, because the cession law reserved to the state "the right to tax persons and corporations, their franchises and property." If the reservation to the State of California of the right to tax persons and corporations, their franchises and property, saved to that state the right to collect excise taxes from persons operating within the Park upon the sale of beer and wine, we submit that the State of Arkansas has the right to levy and collect an excise tax on the privilege of employment by the holder of a leasehold interest, which is unquestionably taxable.

It was said by the Supreme Court of the United States in the case of *Collins v. Yosemite Park & Curry Company, supra:*—"As the respective acts of the state and nation were in the nature of a mutual declaration of rights, this is not an occasion for strict construction of a grant by a state

limiting its taxing powers," and, further, that "Such exempting statutes are to be given liberal construction on behalf of a state."

III.

If it may be said by a strict and technical construction of the Acts of the Arkansas Legislature ceding jurisdiction to the United States that it reserved only the right to levy and collect an *ad valorem* tax on all structures and other property in private ownership within the Hot Springs National Park, it is submitted that the right to levy and collect an unemployment compensation tax from petitioner, and others in its position, was at least impliedly bestowed upon the State by the passage of the Social Security Act of 1935. By Title IX of the Act the Congress levied upon every employer, defined in Section 901 of the Act, an excise tax with respect to employment. At the same time and in the same Act provision was made for an unemployment trust fund into which would be paid taxes collected by the states from the same employers upon whom the federal tax was laid. This action on the part of the United States, and the legislative response thereto on the part of the State, were described by Mr. Justice Stone in the case of *Carmichael, et al v. Southern Coal & Coke Company*, 301 *U. S.* 495, in these words: "Together, the two statutes before us embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other." This thought was approached by the Supreme Court of Arkansas in its opinion when it was said;— "Imposition of the tax here does not in any sense interfere with the government's business. On the contrary, the express social policies of the government are sustained and promoted." (R. 20).

It is respectfully submitted that the decision of the Supreme Court of Arkansas in this case should be affirmed.

W. L. POPE,
Counsel for Respondents.

## APPENDIX

Section 5638 of Pope's Digest of the Statutes of Arkansas: (Omitted since this Section is printed in full in Appellant's Brief).

Section 5659 of Pope's Digest of the Statutes of Arkansas:

> "Exclusive jurisdiction over that part of the Hot Springs Reservation known and described as block eighty-two on the official plat of the United States Hot Springs Commission is hereby ceded and granted to the United States of America to be exercised so long as the same shall remain the property of the United States. *Provided*, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; *Provided, further*, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1891, is hereby reserved to the State of Arkansas as respects the tract hereby ceded."

Section 5651 of Pope's Digest of the Statutes of Arkansas:

> "Exclusive jurisdiction over all lands now or hereafter included in Hot Springs National Park in the State of Arkansas and which have not heretofore been included in acts of the General Assembly of the State of Arkansas is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States. *Provided*, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or crim-

inal, on any person who may be in the park or on park premises; provided further, that the right to tax all structures and other property in private ownership on the Hot Springs National Park is hereby reserved to the State of Arkansas."

Letter from Thos. H. Eliot, General Counsel of the Social Security Board, Washington, D. C.:

"Social Security Board
Washington, D. C.

February 12, 1937.

"To A. E. Demaray,
Act. Director of the National Park Service,
Department of the Interior,
Washington, D. C.

Dear Mr. Demaray:—

In your letter of January 21, 1937, you asked me what assurance can be given by the Social Security Board to a National Park Operator in the State of California, that contributions paid by him to the California Unemployment Compensation Fund, will be allowed as a deduction against the Federal Tax imposed by Title 9 of the Social Security Act.

The Treasury Department has ruled that no credit will be allowed against such tax for payments to a State Fund made voluntarily by an employer without his becoming unqualifiedly subject to the State Act, or liable to render such reports as may be required, or to pay such contributions at such times and in such manner as may be subscribed by State Law or by administrative officers in pursuance thereof.

This ruling appears to apply to a National Pary operator under the circumstances in your letter.

Sincerely yours,

(s) Thos. H. Eliot,
General Counsel."

# SUPREME COURT OF THE UNITED STATES

No. 201.—October Term, 1939.

Buckstaff Bath House Company, Petitioner, vs. Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas, et al.

On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[December 18, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

Section 901 of the Social Security Act (49 Stat. 620) levies an excise tax, equal to specified percentages of total wages paid, on "every employer" of eight or more persons with respect to their "employment". By § 902 the taxpayer may credit against this tax the amount of contributions paid by him into an unemployment fund under a state law, such credit however not to exceed 90 per cent of the tax and to be allowed only for contributions made under the laws of states approved and certified by the Social Security Board in accordance with the standards prescribed in § 903. By § 907 the term "employment" is defined to mean "any service, of whatever nature, performed within the United States by an employee for his employer" except, *inter alia*, service performed "in the employ of the United States Government or of an instrumentality of the United States".

Petitioner is an Arkansas corporation, organized for profit and with its only place of business situated on the United States Government Reservation known as Hot Springs National Park. It operates a bath house, which it erected and equipped, under a long term lease from the Secretary of the Interior. By the terms of that lease the operation and use of the bath house facilities are subject to certain control by the Department of the Interior, which in the main relate to the number of bath tubs which may be used, the charges to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein.

Respondents are officials of the State of Arkansas charged with the duty of enforcement of the Arkansas Unemployment Compensation Law,[1] an act reciprocal to, and integrated with, the Social Security Act.[2] Pursuant to that act respondents sought to collect from petitioner as an employer the required contributions for the calendar year 1937. Petitioner paid into the Treasury of the United States the tax required by the Social Security Act for that period. But it refused to pay the state tax and sued in the state court to enjoin its collection on the grounds, *inter alia*, that it is an instrumentality of the United States and that certain acts of Congress and statutes of Arkansas exempt it from such taxation. The Supreme Court of Arkansas affirmed a decree sustaining a demurrer to the bill and dismissing it, on the grounds that the Arkansas statute was applicable to petitioner and that, on construction of the acts in question, petitioner did not have the claimed immunity. We granted certiorari because that decision was asserted to be repugnant to the acts vesting exclusive jurisdiction over the Hot Springs Reservation in the United States.

Petitioner's contention here, as below, is based primarily on the Act of Congress of March 3, 1891 (26 Stat. 842) whereby the consent of the United States was given "for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation".[3] Petitioner points out that the tax

[1] Act No. 155, approved February 26, 1937; Pope's Digest, §§ 8549 *et seq.*

[2] The Arkansas Unemployment Compensation Law was certified and approved by the Social Security Board under § 903 on March 9, 1937. See Third Annual Report of the Social Security Board, 1938, p. 175.

[3] The cession act of Arkansas was Act No. 30, approved February 21, 1903. It "ceded and granted" to the United States "exclusive jurisdiction" over the area in question "to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs reservation accorded the State by the Act of Congress approved March 3, 1901, is hereby reserved to the State of Arkansas." This cession was accepted by the Act of Congress of April 20, 1904 (33 Stat. 187). As to Arkansas' asserted right to tax property in the reservation prior to the Act of Congress of March 3, 1891, see Ex parte Gaines, 56 Ark. 227.

For earlier Acts of Congress dealing with the rights of the United States to the Hot Springs Reservation see 4 Stat. 505; 20 Stat. 258. The early history of conflicting claims to these hot springs is reviewed in the Hot Springs Cases, 92 U. S. 698. See also Arlington Hotel Co. v. Fant, 278 U. S. 439.

imposed by the Social Security Act against which appropriate credits may be made for contributions under state laws is laid, as stated by this Court in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578, "as a duty, an impost or an excise upon the relation of employment"; and that as held by the Supreme Court of Arkansas the tax in question is "not a tax on personal property; nor is it, in any sense, a property tax". Therefore, petitioner concludes that the United States did not confer on the state of Arkansas the power to impose such a tax but retains its sovereign jurisdiction in that regard since the power of Arkansas to tax was limited to the enumerated property taxes.

We agree with the Supreme Court of Arkansas that the state had jurisdiction to impose the tax in question.

There can be no question but that petitioner is liable for the tax levied by § 901 of the Social Security Act, unless it is exempted by that portion of § 907 which relieves "an instrumentality of the United States" from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner "is engaged in its own behalf, not the government's, in the conduct of a private business for profit". See *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See *Broad River Power Co.* v. *Query*, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *Federal Compress & Warehouse Co.* v. *McLean*, *supra*. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act.

That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in *Steward Machine Co.* v. *Davis, supra*, p. 588, that Act was an attempt to find a method by which the states and the federal government could "work together to a common end". Prior thereto many states had "held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors", *id.*, p. 588. The Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.

Hence, it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the Federal Act. Thus, the exclusion of federal instrumentalities from the scope of the Federal Act, and hence from the complementary state systems, emphasizes the pur-

pose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation. Had it been desired to exempt the equally well known class, of which petitioner is a member, so as to save it from reciprocal state systems, it would seem that an equally clear exception would have been made.

Whether the same result would follow in case the cession act had absolutely forbidden a state to impose any tax on petitioner we need not decide. For here Arkansas did have a prior express power to tax petitioner's property. The implied authority which we here find to exist is therefore used not to override an earlier express authority but merely to extend it to a degree. For in final analysis the Arkansas tax does have some relation to the use of petitioner's property. The existence of the implied authority does not therefore do violence to the earlier statutory grant.

*Affirmed.*

Mr. Justice REED concurs on the ground that the Act of Congress of March 3, 1891 (26 Stat. 842) in which the United States consented "for the taxation . . . as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," should be interpreted to give consent to the application of the Arkansas Unemployment Compensation Law. *Collins* v. *Yosemite Park*, 304 U. S. 518, 532, 534.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*